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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 749.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, AND ROSE DOUGLASS MERRIAM, PLAINTIFFS IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND CHESTER HARDING (ACTING), COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 6, 1908.

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In the Court of Appeals of the District of Columbia.

No. 1815.

ROSA WALLACH ET AL., Appellants,
vs.
THE DISTRICT OF COLUMBIA.

a Supreme Court of the District of Columbia.

No. 556, District Court.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET NORTHWEST.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:—

1 *Petition of John B. Wight et al., Commissioners, for Condemnation of Right of Way for Extension of Eleventh Street.*

Filed May 31, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for said District.

In re EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556

To the supreme court of the District of Columbia, sitting as a district court:

The petition of John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, respectfully shows as follows:

1. That Congress by act approved March 3, 1899, entitled "An act to extend S street, in the District of Columbia, and for other purposes," directed your petitioners to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension of

Eleventh street northwest on a straight extension of the lines thereof as now established in the city of Washington, with a width of ninety feet, from Florida avenue to Harvard street, and thence, with the same width in a straight line, to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue, under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia.

2. That a map of the proposed extension of Eleventh street, showing the number and designation of lots affected, the names of the owners thereof, and the areas of land required for the extension, has been prepared, and a copy thereof is annexed as a part of this petition, marked "Exhibit D. C. No. 1."

3. That said act provides, among other things, that of the amount found due and awarded as damages for and in respect of the land condemned for the extension of the said Eleventh street at least one-half thereof shall be assessed by said jury against those pieces or parcels of ground abutting that portion of the street to be opened, and extending to a depth of two hundred feet from the building lines of said Eleventh street as extended.

Wherefore your petitioners pray this honorable court to direct the marshal of the District of Columbia to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises, on a day specified, to assess the damages, if any, which each owner of land through which Eleventh street is proposed to be extended, as aforesaid, may sustain by reason thereof, and that such other and further orders may by made and proceedings had as are contemplated by said act of Congress and by chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over said lands may by obtained and secured for the aforesaid extension of Eleventh street; and they will ever pray, etc.

JOHN B. WIGHT,
JOHN W. ROSS,
LANSING H. BEACH,
Commissioners of the District of Columbia.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Petitioners.

(Here follows diagram marked p. 2.)

3 *Order for Appearance of Parties Interested.*

Filed September 16, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of an act of Congress approved March 3, 1899, entitled "An act to extend S street, in the District of Columbia, and for other purposes," have filed a petition in this court praying the condemnation of the land required for the extension of Eleventh street northwest on a straight extension of the lines thereof as now established in the city of Washington, with a width of ninety feet, from Florida avenue to Harvard street, and thence, with the same width and in a straight line, to Lydecker avenue, joining said avenue with its center line opposite the *the* center line of Eslin avenue, as shown on a plat or map prepared by said Commissioners and annexed to their said petition and marked "Exhibit D. C. No. 1;" and praying also that a jury be summoned by the marshal, in accordance with the provisions of chapter eleven (11) of the Revised Statutes of the United States relating to the District of Columbia, to ascertain the damages for and in respect of the land proposed to be condemned for the extension of said Eleventh street, and to assess at least one-half thereof against those pieces or parcels of ground abutting that portion of the street to be opened and extending to a depth of two hundred feet from the building lines of said Eleventh street as extended.

It is ordered, this 16th day of September, A. D. 1899, that all persons interested in the proceedings be, and they are hereby, required to appear in this court on or before the 2d day of October, 1899, to show cause, if any they have, why the prayer of said petition should not be granted and why the proceedings directed in said act of Congress should not be taken:

Provided a copy of this order be published in the Evening Star and the Washington Times newspapers at least six times, and in the Washington Law Reporter once, before the 2d day of Oct., 1899.

By the court:

CHAS. C. COLE,
Asso. Justice.

4 *Order Directing Marshal to Summon Jury.*

Filed November 10, 1899.

1 the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556.

On consideration of the petition of the Commissioners of the District of Columbia, filed herein, and it appearing to the court that the

notice heretofore ordered herein has been duly published, it is, this 10th day of November, A. D. 1899, on motion of counsel for said Commissioners, ordered that the United States marshal for the District of Columbia summon a jury of seven (7) judicious, disinterested men, not related to any party interested in this proceeding, to be and appear upon the premises described in the petition herein on a day specified, to assess the damages, if any, which each owner of land may sustain by reason of the extension of Eleventh street northwest on a straight extension of the lines thereof as now established in the city of Washingten, with a width of ninety (90) feet, from Florida avenue to Harvard street, and thence, with the same width and in a straight line, to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue, as prayed in said petition; and of the amount found due and awarded damagss by said jury in respect of the land condemned for the extension of said Eleventh street at least one-half thereof shall be assessed by said jury against those pieces or parcels of ground abutting that portion of the street to be opened and extending to a depth of two hundred (200) feet from the building lines of said Eleventh street as extended; and to further proceed in accordance with the act of Congress approved March 3, 1899, entitled "An act to extend S street, in the District of Columbia, and for other purposes."

By the court:

A. B. HAGNER,
Asso. Justice.

Memorandum.

February 20, 1900.—Verdict of jury of seven filed.

5 *Award of Damages for the Extension of 11th Street Northwest.*

Description of piece or parcel of land taken.	Area taken (sq. ft.).	Award of damages.
* * * * * * *	*	*
Part of lot 7, block 12 of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	8,680.75	5,208.00
Part of lot 8, block 12, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	381.50	229.00
Part of lot 5, block 13, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	3,773.25	2,453.00
* * * * * * *	*	*

Award of Damages, etc.—Continued.

Description of piece or parcel of land taken.	Area taken (sq. ft).	Award of damages.
Part of lot 7, block 13, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	10,322.30	5,161.00
Part of lot 8, block 13, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	8.20	4.00
Part of lot 4, block 14, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	2,564.25	1,282.00
51½ Part of lot 7, block 14, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	5,184.75	2,852.00
Part of lot 4, block 15, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	9,340.75	5,604.00
* * * * *	*	*
Part of lot 6, block 16, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	9,446.05	5,195.00
* * * * *	*	*
Part of lot 5, block 17, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	5,587.50	3,911.00
Part of lot 6, block 17, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	7,457.20	5,220.00
Part of lot 7, block 17, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	488.30	342.00
Part of lot 9, block 17, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	2,086.50	1,252.00
Part of lot 5, block 18, of Todd and Brown's subdivision, included within the lines of Eleventh street extended, as shown by map annexed to petition in this cause.....	6,154.50	4,000.00

	Description of piece or parcel benefited.	Owner.	Am't of assessment
	All of lot 5, block 12, Todd & Brown subdivision	Rose Wallach & Jesse Brown...	488.00
	* * * * * * *		
	Part of lot 7, block 12, Todd & Brown subdivision: Beginning at the southeast corner of said lot, thence south 83 degrees and 23 minutes west 8.06 ft. to the east line of 11th St. extended, thence with said line to its intersection with the east line of lot 7, thence south 6 degrees 37 minutes east 69.08 ft. to the place of beginning	Rose Wallach & Jesse Brown...	28.00
	Part of lot 8, block 12, Todd & Brown subdivision: Beginning at the southeast corner of said lot, thence south 83 degrees 23 minutes west 50 ft., thence north 6 degrees 37 minutes west to the east line of 11th St., thence with said line to the north line of lot 8, thence north 83 degrees 23 minutes east 40.57 ft. to the beginning	Rose Wallach & Jesse Brown...	640.00
	Part of lot 5, block 13, Todd & Brown subdivision: Beginning at the southeast corner of said lot, thence south 83 degrees 23 minutes west 33.59 ft. to the east line of 11th St. extended, thence with said line to the rear of said lot, thence north 83 degrees 23 minutes east 16.10 ft., thence south 6 degrees 37 minutes east 150 ft. to the beginning	R. Wallach & J. Brown.....	410.00
7	All of lot 8, block 13, Todd & Brown subdivision	R. Wallach & J. Brown.....	674.00
	* * * * * * *		
	Part of lot 4, block 14, Todd & Brown subdivision: Beginning at the southeast corner of said lot, thence south 83 degrees 23 minutes west 41.64 ft. to the east line of 11th St. extended, thence with said line to the rear of said lot, thence north 83 degrees 23 minutes east 24.17 ft., thence south 6 degrees 37 minutes east 150 ft. to the beginning	R. Wallach & J. Brown.....	519.00

Assessment of Benefits, etc.—Continued.

Description of piece or parcel benefited.	Owner.	Am't of assessment.
Part of lot 7, block 14, Todd & Brown subdivision: Beginning at the southeast corner of said lot, thence south 83 degrees 23 minutes west 24.17 ft. to the east line of 11th St., thence with said line to the north line of said lot, thence north 83 degrees 23 minutes east 6.70 ft., thence south 6 degrees 37 minutes east 150 ft., to the beginning..	R. Wallach & J. Brown.....	208.00
Part of lot 6, block 16, Todd & Brown subdivision: Beginning at the southwest corner of said lot, thence north 6 degrees 37 minutes west 282.35 ft. to the north line of said lot, thence north 83 degrees 23 minutes east 6.85 ft. to the west line of 11th St. extended, thence with said line south 10 degrees 38 minutes east to the rear of said lot, thence with said rear line 28.28 — to the place of beginning.....	Rose Wallach & J. Brown	246.00
All of lot 12, block 16, Todd & Brown subdivision	R. Wallach & J. Brown.....	488.00
8 All of lot 13, block 16, Todd & Brown subdivision.....	R. Wallach & J. Brown.....	244.00
Part of lot 5, block 17, Todd & Brown subdivision: Beginning at the southeast corner, thence south 83 degrees 23 minutes west 7.28 ft., to the east line of 11th St. extended, thence with said line north 10 degrees 38 minutes west to north line of said lot, thence north 83 degrees 23 minutes east 18.22 ft. to east line of said lot, thence south 6 degrees 37 minutes east 150 ft. to the beginning.....	Rose Wallach & Jesse Brown....	191.00
Part of lot 6, block 17, Todd & Brown subdivision: Beginning at the southwest corner of the said lot, thence north 6 degrees 37 minutes west 34.28 ft. to intersection of west line of 11th St. extended, thence south 10 degrees 38 minutes east with said line of 11th St. to south line of said lot, thence south 83 degrees 23 minutes west 2.50 ft. to the beginning.....	Rose Wallach & Jesse Brown....	4.00

Assessment of Benefits, etc.—Continued.

Description of piece or parcel benefited.	Owner.	Am't of assessment.
Part of lot 7, block 17, Todd & Brown subdivision: Beginning at the south-east corner of said lot, thence south 83 degrees 23 minutes west 50 ft. to west line of said lot, thence with said line north 6 degrees 37 minutes west 150 ft. to north line of said lot, thence north 83 degrees 23 minutes east to west line of 11th St. ext'd, thence with said line south 10 degrees 38 minutes east to intersection of east line of said lot, thence south 6 degrees 37 minutes east 34.28 ft. to the beginning	Rose Wallach & Jesse Brown...	1,052.00
All of lot 4, block 18, Todd & Brown subdivision	Rose Wallach & Jesse Brown....	488.00
9 Part of lot 9, block 17, Todd & Brown subdivision: Beginning at the northwest corner of said lot, thence north 83 degrees, 23 minutes east 17.24 ft. to west line of 11th St. ext'd, thence with said line south 10 degrees 38 minutes east to south line of said lot, thence south 83 degrees 23 minutes west to west line of said lot, thence with said line 162.62 ft. to the beginning	Rose Wallach & Jesse Brown...	1,220.00
* * * * * * *		
Part of lot 5, block 18, Todd & Brown subdivision: Beginning at the S. E. corner of said lot, thence south 83 degrees 23 minutes west 33.57 — to east line of 11th St. ext'd, thence with said line north 10 degrees 38 minutes west to north line of said lot, thence north 83 degrees 23 minutes east to east line of said lot, thence south 6 degrees 37 minutes east 150 ft. to the beginning...	Rose Wallach & Jesse Brown...	700.00

Memorandum.

Objections of land owners to verdict, filed.

10 *Order Confirming Award of Damages, &c.*

Filed July 3, 1900.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

In re THE EXTENSION OF ELEVENTH STREET. No. 556, District Court.

This cause came on to be heard on the motion of the petitioners herein, The Commissioners of the District of Columbia, filed under the act of Congress approved June 6, 1900, to confirm the verdict, award, and assessment of the jury heretofore filed herein, and to overrule the exceptions filed by the several owners of real estate who are assessed for benefits in and by said verdict of said jury; and the said motion was argued by counsel for the respective parties, and it appearing to the court that the order *nisi*, confirming said verdict, award, and assessment of said jury, has been duly published as therein provided, and that the owners of the property taken for the extension of said street and the owners of the land assessed with one-half of the amount awarded for damages have been duly notified of the pendency of this proceeding and of the said assessments, as provided by the order of the court heretofore passed herein—

It is, this 3d day of July, A. D. 1900, by the court adjudged, ordered, and decreed that the several awards of the said jury for and in respect of the land condemned for the extension of said Eleventh street be, and the same are hereby, finally ratified and confirmed, and that the land necessary for the extension of Eleventh street northwest on a straight extension of the lines thereof as now established in the city of Washington, with a width of ninety feet, from Florida avenue to Harvard street, and thence, with the same width and in a straight line, to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue, and in this proceeding described and shown on the plat filed herein, be, and the same is hereby, condemned; and payment of the several sums of money in said verdict found to be due and payable for the lands aforesaid shall be made in accordance with the act of Congress approved March 3, 1899, and the amendments thereof approved June 6, 1900, pursuant to which proceedings in this cause have been had.

And it is further adjudged, ordered, and decreed that the several assessments for benefits made, returned, and levied by the jury in its aforesaid award filed in this cause be, and they are hereby, declared illegal, null, and void, and the same are hereby set aside and vacated; and from so much of this order as declares said assessments to be illegal, null, and void the petitioners in open court pray an appeal to the Court of Appeals, which is hereby allowed.

E. F. BINGHAM, *C. J.*

11 *Mandate.*

Filed July 22, 1903.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:
[SEAL.]

Whereas, lately in the Supreme Court of the District of Columbia, before you or some of you, in a cause entitled *In re* Extension of Eleventh Street Northwest, No. 556, District Court, wherein the order of the said Supreme Court entered in said cause on the 3d day of July, A. D. 1900, is in the following words, viz:

"*In re* THE EXTENSION OF ELEVENTH STREET. No. 556, District Court.

This cause came on to be heard on the motion of the petitioners herein, The Commissioners of the District of Columbia, filed under the act of Congress approved June 6, 1900, to confirm the verdict, award, and assessment of the jury heretofore filed herein, and
12 to overrule the exceptions filed by the several owners of real estate who are assessed for benefits in and by said verdict of said jury; and the said motion was argued by counsel for the respective parties, and it appearing to the court that the order *nisi*, confirming said verdict, award, and assessment of said jury, has been duly published as therein provided, and that the owners of the property taken for the extension of said street and the owners of the land assessed with one-half of the amount awarded for damages have been duly notified of the pendency of this proceeding and of the said assessments, as provided by the order of the court heretofore passed herein—

It is this 3d day of July, A. D. 1900, by the court adjudged, ordered, and decreed that the several awards of the said jury for and in respect of the land condemned for the extension of said Eleventh street be, and the same are hereby, finally ratified and confirmed, and that the land necessary for the extension of Eleventh street northwest on a straight extension of the lines thereof as now established in the city of Washington, with a width of ninety feet, from Florida avenue to Harvard street, and thence, with the same width and in a straight line, to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue, and in this proceeding described and shown on the plat filed herein, be,
13 and the same is hereby, condemned; and payment of the several sums of money in said verdict found to be due and payable for the lands aforesaid shall be made in accordance with the act of Congress approved March 3, 1899, and the amendment thereof approved June 6, 1900, pursuant to which proceedings in this cause have been had.

And it is further adjudged, ordered and decreed that the several assessments for benefits made, returned and levied by the jury in its aforesaid award filed in this cause be, and they are hereby declared illegal, null and void, and the same are hereby set aside and vacated; and from so much of this order as declares said assessments to be illegal, null and void the petitioners in open court pray an appeal to the Court of Appeals, which is hereby allowed.

E. F. BINGHAM, *C. J.*"

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, taken by John B. Wight, John W. Ross and Lansing H. Beach, Commissioners of the District of Columbia, whereon Eugene Byrnes *et al.*, were made the parties appellees, agreeably to the Act of Congress in such case made and provided, fully and at large appears.

And whereas at the April Term, A. D. 1901, of said Court of Appeals, the death of John Sherman, one of the appellees, having been suggested, it was, at the January Term A. D. 1902 of said
14 Court of Appeals, ordered that Myron M. Parker, and Winfield S. Kerr, Executors of the said John Sherman, deceased, be made parties appellees herein.

And whereas at the April Term, A. D. 1901, of said Court of Appeals, the retirement of John B. Wight and the appointment of Henry B. F. Macfarland as his successor as Commissioner of the District of Columbia having been suggested, it was ordered that the said Henry B. F. Macfarland, as such Commissioner, be made a party appellant herein.

And whereas at the October Term, A. D. 1901, of said Court of Appeals, the retirement of Lansing H. Beach, and the appointment of John Biddle as his successor as Commissioner of the District of Columbia, having been suggested, it was ordered that the said John Biddle, as such Commissioner, be made a party appellant herein.

And whereas, in the term of April, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the order of the said Supreme Court in this cause, appealed from, and only so far as appealed from, be, and the same is hereby, reversed; and it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court with directions to vacate such part of the said order, and for such further proceedings in the cause according to law as may be right and just.

15 APRIL 1, 1902.

And whereas said cause was removed to the Supreme Court of the United States by virtue of an appeal taken by Henry B. F. Macfarland, John W. Ross and John Biddle, Commissioners of the District

of Columbia, agreeably to the Act of Congress in such case made and provided:

And whereas at the October Term, 1902, of said Supreme Court of the United States the following decree was entered, viz:

"It is now here ordered, adjudged and decreed by this Court that this appeal be, and the same is hereby, dismissed for the want of jurisdiction.

December 1, 1902."

as by the inspection of the mandate of said Supreme Court of the United States fully and at large appears.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 22d day of July in the year of our Lord one thousand nine hundred and three.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

16 Supreme Court of the District of Columbia.

FRIDAY, *March 4th*, 1904.

Session resumed pursuant to adjournment, present presiding, Justice Ashley M. Gould.

In re EXTENSION OF ELEVENTH STREET. No. 556, District Court.

Upon consideration of the mandate of the Court of Appeals filed in this case, it is this 4th day of March, 1904, ordered that the decree in this case, vacating said assessment and only so far as it vacates said assessment, be and the same is hereby set aside and vacated, in accordance with said mandate.

And the case being further heard on motion of the petitioners for confirmation of the assessments for benefits according to the verdict of the jury of seven, and after argument by Counsel for the parties, and due consideration of the exceptions of the respondents, from which it appears to the Court that they and each of them are dissatisfied with said verdict, it is therefore ordered that said motion to confirm be and the same is hereby, in all respects, overruled; and it is further ordered, in case the petitioners desire to proceed further in the premises that they shall within a reasonable time make application to this Court for directing the United States Marshal to summon a jury of twelve as provided by law. To which order
17 petitioners except and pray and appeal in open Court.

ASHLEY M. GOULD, *Justice.*

BLURRED

Motion of Abner Greenleaf to Dismiss.

Filed June 17th, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF 11TH ST. No. 556.

Now come Abner Greenleaf and other property owners, representative of record by Leo Simmons and Samuel Maddox and move the Court to dismiss this suit, as to any further proceedings in this cause, because the law under which such proceeding must be had, has been repealed. Second, for failure of the petitioners to proceed as required by the order of this Court, passed in the cause on March 4th, 1904.

LEO SIMMONS AND
SAM'L MADDOX,
Att'ys for Said Owners.

Messrs. Duvall & Sinclair, att'ys for petitioners:

Take notice, we will call up the above motion before Mr. Justice Gould, holding a District Court, on Tuesday the 7th day of
18 June, 1904, at ten o'clock A. M. or as — counsel can be heard.

LEO SIMMONS AND
SAM'L MADDOX, *Att'ys.*

Service accepted 6/2/04.

A. B. DUVALL,
Per G.

Order Directing Petitioners to Reassess Benefits, &c.

Filed June 17, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF ELEVENTH STREET. No. 556.

Upon consideration of the proceedings herein and the motion filed by Abner Greenleaf and others on June 17th A. D. 1904, it is, by the Court, this 17th day of June, A. D. 1904, ordered, That the petitioners in the above-entitled cause, within sixty days from the date hereof, proceed in the matter of the re-assessment of benefits herein, in accordance with the terms and provisions of the Act of Congress approved June 6, 1900, entitled "An Act for the Extension of Columbia Road east of Thirteenth Street, and for other purposes."

By the court.

ASHLEY M. GOULD, *Justice.*

PAGES

19 *Amended and Supplemental Petition of the Commissioners, D. C.*

Filed August 9, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556, District Court.

The petition of Henry B. F. Macfarland, Henry L. West, and Chester Harding, (Acting) Commissioners of the District of Columbia, respectfully represents:

1. That heretofore, to wit, on the 31st day of May, 1899, the then Commissioners of the District of Columbia, pursuant to the provisions of an Act of Congress approved March 3, 1899, filed a petition herein praying the condemnation of certain land necessary for the extension of Eleventh Street, Northwest, on a straight extension of the lines thereof, with a width of ninety feet, from Florida Avenue to Harvard Street, and thence, with the same width and in a straight line, to Lydecker Avenue, joining said Avenue with its center line opposite the center line of Eslin Avenue, under and according to the provisions of chapter XI of the Revised Statutes of the United States relating to the District of Columbia.

2. That thereafter, on the 10th day of November, 1899, this Honorable Court directed the United States Marshal for the District of Columbia, to summon a jury of seven judicious, disinterested
20 men, not related to any party interested in the proceeding, to be and appear upon the premises described in said petition on a day specified, to assess the damages, if any, which each owner of land might sustain by reason of the extension of said Eleventh Street, as aforesaid, and to assess at least one-half of the amount found due and awarded as damages by said jury in respect of the land condemned for said execution, against those pieces or parcels of ground abutting that portion of the street to be opened and extended to a depth of two hundred feet from the building lines of said Eleventh Street as extended, and to further proceed in accordance with the provisions of the aforesaid Act of Congress approved March 3, 1899.

3. That thereafter a jury of seven person- was impaneled, received instructions from the Court as to its duties, proceeded to assess the damages and benefits, and on the 16th day of February, 1900, filed its verdict and award herein.

4. That on March 19, 1900, an order of ratification *nisi* of said verdict and award was passed, and on July 3, 1900, the Court passed an order herein finally ratifying and confirming the several awards of said jury for and in respect of the land condemned for the extension of Eleventh Street, as aforesaid, but vacated the assessments for benefits made by the jury and declared them illegal, null and void.

5. That thereafter, on appeal to the Court of Appeals of the Dis-

trict of Columbia, the said order of the Court passed herein
21 was reversed in so far as it vacated the said assessments for benefits.

6. That on the 4th day of March, 1904, that portion of the aforesaid order which vacated said assessments for benefits, was set aside by the Court, in accordance with the mandate of the Court of Appeals; and the case being further heard, upon motion of the petitioners to ratify and confirm the assessments for benefits made by the jury, the Court, upon consideration of certain exceptions filed in the case (from which it appeared that the exceptants were dissatisfied with the verdict of the jury), passed an order overruling the motion to ratify and confirm said assessments for benefits.

7. That Section 12 of the Act of Congress approved June 6, 1900, entitled "An Act for the Extension of Columbia Road east of Thirteenth Street, and for other purposes," provides, amongst other things, that:—

"In the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall for any reason be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for a re-assessment of such benefits under and in accordance with the provisions of this Act."

8. That on the 17th day of June, 1904, the Court passed an order herein directing the petitioners, within sixty days from said date, to proceed in the matter of the re-assessment of benefits herein, in accordance with the terms and provisions of the said Act of Congress approved June 6, 1900.

22 The premises considered, your petitioners pray:

First. That this Honorable Court may cause public notice of not less than ten days to be given of the filing of this, the amended and supplemental petition of the Commissioners of the District of Columbia, by advertisement in such manner as the Court shall prescribe, warning all persons having any interest in the proceedings to attend Court on a day to be named in said notice and to continue in attendance until the Court shall have made its final order ratifying and confirming the re-assessments of benefits of the jury herein.

Second. That the United States Marshal for the District of Columbia may be directed to summon seven judicious, disinterested men not related to any person interested in this proceeding and not in the service or employ of the District of Columbia or of the United States, to re-assess such amount of the amount heretofore found to be due and awarded as damages for and in respect of the land condemned for the extension of Eleventh street, as aforesaid, as benefits, and to the extent of such benefits, against those pieces or parcels of land on each side of said Eleventh street as extended, and also on any and all pieces or parcels of land which have been benefited by the extension of said Eleventh street, as aforesaid, as said jury may find said pieces or parcels of land have been benefited by the extension of Eleventh street, northwest, in accordance with the provisions of the aforesaid Act of Congress approved June 6, 1900.

And that such other and further orders may be passed and
23 such other proceedings may be had herein, as are contemplated by said Acts of Congress approved March 3, 1899, and June 6, 1900.

HENRY B. F. MACFARLAND,
HENRY L. WEST,
CHESTER HARDING, *Acting,*
Commissioners D. C. and Petitioners Herein.

A. B. DUVALL,
A. LEFTWICH SINCLAIR,
Attorneys for Petitioners.

DISTRICT OF COLUMBIA, *ss:*

Personally appears Henry B. F. Macfarland, who upon oath says, that he is President of the Board of Commissioners of the District of Columbia, whose foregoing petition he has read, and that the facts therein stated are true to the best of his knowledge and belief.

HENRY B. F. MACFARLAND.

Subscribed and sworn to before me this 5th day of August, A. D. 1904.

[SEAL.] WILLIAM TINDALL,
Notary Public, D. C.

(Endorsed:) Let this amended petition be filed. Job Barnard, Justice.

24 *Order Warning Persons Interested to Appear, &c.*

Filed October 27, 1904.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST. No. 556, District Court Docket.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to an order passed herein on the 17th day of June, 1904, and the provisions of an Act of Congress approved June 6, 1900, entitled "An Act for the extension of Columbia Road east of Thirteenth street, and for other purposes," have filed an amended and supplemental petition herein, praying that a jury of seven (7) judicious, disinterested men, not related to any person interested in this proceeding and not in the service or employ of the District of Columbia or of the United States, to be summoned by the United States Marshal for the District of Columbia, to re-assess such amount of the amount heretofore found to be due and awarded as damages for and in respect of the land condemned for the extension of

Eleventh street, northwest, on a straight extension of the lines thereof, with a width of ninety (90) feet, from Florida avenue to Harvard street, and thence, with the same width and in a straight line, to Lydecker avenue, joining said avenue with its center
25 line opposite the center line of Eslin avenue, as benefits, and to the extent of such benefits, against those pieces or parcels of land on each side of said Eleventh street as extended, and also on any and all pieces or parcels of land which have been benefited by the extension of said Eleventh street, as aforesaid, as said jury may find said pieces or parcels of land have been benefited, in accordance with the provisions of the aforesaid Act of Congress. It is, by the court, this 27th day of October, A. D. 1904, Ordered: That all persons having any interest in this proceeding be, and they are hereby, warned and required to appear in this court on or before the 28th day of November, A. D. 1904, and to continue in attendance until the court shall have made its final order ratifying and confirming the re-assessment of benefits, of the jury to be impaneled herein. *It is further ordered*, That this notice and order be published once in The Washington Law Reporter, and on six secular days in The Evening Star, The Washington Post and The Washington Times, newspapers published in said District, before the 28th day of November, A. D. 1904.

By the Court:

ASHLEY M. GOULD, *Justice.*

Order Directing Marshal to Summon Jury to Reassess Benefits.

Filed February 9, 1906.

In the Supreme Court of the District of Columbia, Holding a District Court.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET.
No. 556, District Court.

26 Upon consideration of the petition of the Commissioners of the District of Columbia, filed herein, and it appearing to the Court that the notice heretofore ordered herein has been duly published, it is, on motion of counsel for the said Commissioners, this 9th day of February, A. D. 1906, ordered, that the Marshal of the District of Columbia summon a jury of seven judicious, disinterested men, not related to any person interested in these proceedings, and not in the service or employment of the District of Columbia or of the United States, to be impaneled and sworn by the Court on the 16th day of February, A. D. 1906, at ten o'clock A. M., to re-assess the benefits resulting from the extension of Eleventh Street, in accordance with the provisions of the Act of Congress approved June 6, A. D. 1900, entitled "An Act for the Extension of Columbia road east of Thirteenth Street, and for other purposes."

By the Court:

JOB BARNARD, *Justice.*

Marshal's Return.

Feb. 15, 1906.—Pursuant to within order personally summoned the following named jurors:

1. John E. Herrell.
2. W. A. H. Church.
3. William V. Cox.
4. James F. Oyster.
5. Daniel Fraser.
6. Edward Graves.
7. John H. Nolan.

AULICK PALMER,
U. S. Marshal D. C.
R.

27 *Memorandum.*

March 16, 1906.—Order accepting jury, and instructions.

Pleas of Rosa Wallach and Devisees of Jesse Brown, &c.

Filed March 29, 1906.

In the Supreme Court of the District of Columbia, Holding a District Court.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET. No. 556.

And now come respondents Rosa Wallach and Emily N. Wallach, Mary Alexander Mitchell and Rose Douglas Merriam, devisees of Jesse Brown deceased, and for pleas to the amended petition of the Commissioners of the District of Columbia filed herein on the 9th day of August, 1904, say:

1. That the verdict of the jury of seven filed herein on the 9th day of May 1900, became and was a nullity as to lots then owned by respondent Rosa Wallach and the said Jesse Brown, then in life, on the filing by them in this cause of exceptions to said verdict, and that a re-assessment of benefits, if any, to said lots can only be had under and in accordance with the act of Congress approved March 3, 1899, under which the proceedings in this cause were instituted,
28 and that no proper step has or could have been taken in this cause since said proceedings were so instituted to set in motion the instrumentalities of the Act of June 6, 1900, under which said petition was filed.

2. And for a further plea these respondents say that the cause of action set up in said petition filed as aforesaid on the 9th day of August, 1904, did not accrue within three years next before the filing thereof.

Wherefore these respondents pray judgment if the said Commissioners of the District of Columbia ought to have or maintain their

aforesaid action against them predicated of the said petition filed in this cause on the 9th day of August 1904.

SAM'L MADDOX,
Attorney for Respondents.

(Endorsed:) Leave is hereby given to file these pleas. Job Barnard, Justice. M'ch 29/06.

Verdict.

Filed June 6, 1906.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST, IN THE DISTRICT OF COLUMBIA. No. 556, District Court.

We, the undersigned, heretofore summoned, accepted and sworn herein as a jury to assess the benefits which have accrued to
29 property by reason of the extension of Eleventh street, northwest, on a straight extension of the lines thereof, with a width of ninety feet from Florida avenue to Harvard street, and thence with the same width and in a straight line to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue, in the District of Columbia, in accordance with the provisions of an Act of Congress approved June 6, 1900, entitled "An Act for the extension of Columbia road east of Thirteenth street, and for other purposes," respectfully certify and show to the Court:—

That after being sworn by the Court for the proper performance of our duties, we personally viewed and examined the land in the neighborhood of the said extension, with great care and thereafter, at the United States Court House, in the City of Washington, in said District, on the 28th day of March, A. D. 1906, at 2 o'clock P. M., and from time to time thereafter, pursuant to adjournment, after due notice to the persons interested herein, we met and heard and received such evidence as was offered or submitted to us on behalf of the District of Columbia and by the persons interested, touching the benefits which have accrued to property by reason of the extension of said Eleventh street, as aforesaid, and upon our personal view and examination aforesaid, and the evidence aforesaid, we find that the lots, pieces or parcels of land which have been benefited by the aforesaid extension of said Eleventh street are the lots, pieces or parcels of land mentioned set forth and described in the fol-
30 lowing schedule; and we, the jury aforesaid, find that the several lots, pieces or parcels of land mentioned and set forth in said schedule have been benefited to the extent of the respective amounts mentioned and set forth in said schedule, and we hereby assess against the said lots, pieces or parcels of land, respectively, as

and for benefits, as aforesaid, the several amounts mentioned, specified, and set forth in said schedule.

Witness our hands and seals this 6 day of June, A. D. 1906.

JOHN E. HERRELL. [SEAL.]
DANIEL FRASER. [SEAL.]
W. V. COX. [SEAL.]
JAS. F. OYSTER. [SEAL.]
JOHN H. NOLAN. [SEAL.]
W. A. H. CHURCH. [SEAL.]
EDWARD GRAVES. [SEAL.]

31 SCHEDULE.

Assessments for Benefits

Against lots in Columbia Heights, recorded in Surveyor's Office, Book Governor Shepherd, p. 158, as follows:

* * * * * * *

Against those lots in Block 13, Todd and Brown's Subdivision subdivided as lots 16 to 23 in County Book 19, p. 10, Surveyor's Office, D. C., as follows:

Against lot 16, F. G. Carpenter, owner, amount assessed as benefits..... $400.
Against lot 17, F. G. Carpenter, owner, amount assessed as benefits..... $275.
Against lot 18, F. G. Carpenter, owner, amount assessed as benefits..... $275.
Against lot 19, F. G. Carpenter, owner, amount assessed as benefits..... $275.
Against lot 20, F. G. Carpenter, owner, amount assessed as benefits..... $275.
Against lot 21, F. G. Carpenter, owner, amount assessed as benefits..... $275.
Against lot 22, F. G. Carpenter, owner, amount assessed as benefits..... $275.
Against lot 23, F. G. Carpenter, owner, amount assessed as benefits..... $275.

* * * * * * *

Against a part of Block 14, Todd and Brown's Subdivision: Beginning at the southwest corner of lot 2 in said Block 14, as recorded in Levy Court No. 2, p. 24, Surveyor's Office, D. C., thence northerly along the west line of said lot 2; thence at right angles thereto and westerly 74.17 feet to Eleventh street; thence southwest 151.00 to a point 91.64 feet from the beginning; thence to the place of beginning, J. B. Lybrook, owner, amount assessed as benefits..... $1500.

* * * * * * *

32 Against lots in Block 14, Todd and Brown's subdivision, resubdivided as lots 46 to 53, in County Book 16, p. 23, Surveyor's Office, D. C., as follows:

Against lot 46, Adams-Munroe Manufacturing Company, owners, amount assessed as benefits..... $250.
Against lot 47, Adams-Munroe Manufacturing Company, owners, amount assessed as benefits..... $250.
Against lot 48, E. I. Skinner, *et al.*, owners, amount assessed as benefits..... $250.
Against lot 49, F. Fraser, owner, amount assessed as benefits.. $250.
Against lot 50, Adams-Munroe Manufacturing Company, owners, amount assessed as benefits..... $250.
Against lot 51, Adams-Munroe Manufacturing Company, owners, amount assessed as benefits..... $250.
Against lot 52, M. P. Hufty, owner, amount assessed as benefits..... $250.
Against lot 53, G. C. Muller, owner, amount assessed as benefits..... $400.

* * * * * * *

Against lots and parts of lots in Block 15, Todd and Brown Subdivision, Levy Court, No. 2, p. 24, Surveyor's Office, D. C., as follows:

* * * * * * *

Against all of lot 6, Block 15, A. M. Cocks, owner, amount assessed as benefits..... $700.

* * * * * * *

Against all that part of lot 4, Block 15, not condemned for the extension of Eleventh street, J. W. Morris, owner, amount assessed as benefits..... $300.

* * * * * * *

33 Against lots in Block 16, Todd and Brown's subdivision as by record in Book Levy Court No. 2, Surveyor's Office, D. C., as follows:

* * * * * * *

Against lot 12, block 16, Rose Wallach, owner, amount assessed as benefits..... $400.
Against lot 13, block 16, Rose Wallach, owner, amount assessed as benefits..... $50.

* * * * * * *

Against certain lots in block 16, Todd and Brown's Sub., subdivided as lots 79 to 92 in County Book 20, p. 106, Surveyor's Office, D. C., as follows:

Against lot 79, Harry Wardman, owner, amount assessed as benefits ..... $150.
Against lot 80, Harry Wardman, owner, amount assessed as benefits ..... $200.
Against lot 81, Harry Wardman, owner, amount assessed as benefits ..... $300.
Against lot 82, Harry Wardman, owner, amount assessed as benefits ..... $200.
Against lot 83, Harry Wardman, owner, amount assessed as benefits ..... $200.
Against lot 84, Harry Wardman, owner, amount assessed as benefits ..... $200.
Against lot 85, Harry Wardman, owner, amount assessed as benefits ..... $200.
Against lot 86, Harry Wardman, owner, amount assessed as benefits ..... $200.
Against lot 87, Harry Wardman, owner, amount assessed as benefits ..... $200.
Against lot 88, Harry Wardman, owner, amount assessed as benefits ..... $200.
Against lot 89, Harry Wardman, owner, amount assessed as benefits ..... $200.
Against lot 90, Harry Wardman, owner, amount assessed as benefits ..... $200.
Against lot 91, Harry Wardman, owner, amount assessed as benefits ..... $200.
Against lot 92, Harry Wardman, owner, amount assessed as benefits ..... $250.

Against parts of lots 7 and 9, Block 17, Todd and Brown's Sub., Levy Court No. 2, p. 24, Surveyor's Office, D. C., described as follows:

34 Against all that part of lot 7, not condemned for the extension of Eleventh street, L. & A. Steerman, owner, amount assessed as benefits ..... $1000.
Against all that part of lot 9, not condemned, for the extension of Eleventh street, Rose Wallach, owner, amount assessed as benefits ..... $2000.

* * * * * * *

Against lots in Block 18, Todd and Brown's subdivision resubdivided as lots 55 to 63, County Book 20, p. 78, as follows:

Against lot 55, Harry Wardman, owner, amount assessed as benefits ..... $250.
Against lot 56, Harry Wardman, owner, amount assessed as benefits ..... $150.
Against lot 57, Harry Wardman, owner, amount assessed as benefits ..... $150.
Against lot 58, Harry Wardman, owner, amount assessed as benefits ..... $150.

Against lot 59, Harry Wardman, owner, amount assessed as benefits ..... $150.
Against lot 60, Harry Wardman, owner, amount assessed as benefits ..... $150.
Against lot 61, Harry Wardman, owner, amount assessed as benefits ..... $150.
Against lot 62, Harry Wardman, owner, amount assessed as benefits ..... $150.
Against lot 63, Harry Wardman, owner, amount assessed as benefits ..... $150.

* * * * * * *

35 *Exceptions of Rosa Wallach and Others to Verdict of Jury.*

Filed July 5, 1906.

In the Supreme Court of the District of Columbia, Holding a District Court.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET. No. 556.

And now comes Rosa Wallach, Emily Neville Wallach, Mary Alexander Mitchell and Rose Douglass Merriam, owners of Lot 12 Block 16, and part of Lot 9 in Block 17, and until quite recently owners of part of Lot 5 and all of Lot 4 in Block 18, and of parts of Lot 6 Block 16, and of part of Lot 4 Block 14, all in Todd and Brown's Subdivision and involved in these proceedings, and object and except to the assessment for benefits against said lots made by the commission of seven, or jury, in and by their finding or verdict filed herein on the 6th day of June, 1906, and for cause of exception and objection, they set forth and show:

1. That said assessments against said lot- and parts of lots are each and all unjust, unreasonable, excessive and tend to the confiscation of these exceptants' property.

2. That an assessment is levied in a lump sum against said part of lot 4 and all of Lot 3 in Block 14, although until to wit the month of June 1906, said part of lot 4 belonged to these exceptants,
36 and said lot 3 to other persons, in which said last mentioned month said part of said Lot 4 was sold with a guaranty by these exceptants against assessments in these proceedings:—Whereas the said commission or jury should have designated what part of said lump sum assessment, the same being $1500, was properly chargeable upon each of said lots.

3. That within the past two months a subdivision of part of Lot 6 in Block 17 has been made in connection with all of Lot 7 in the same Block, and an assessment of $2900. levied against lots as shown in said subdivision without designating what part thereof is chargeable against said part of Lot 6 as it existed after the lines of the extension of Eleventh Street were fixed, and as it so remained down to to wit the month of March 1906, at which time the said part of Lot 6 was sold by these exceptants with a guaranty by them against any assessment as for benefits in these proceedings.

4. That it would be unjust and inequitable, after the great lapse of time since the commencement of these proceedings to confirm said assessment, because it is manifestly impossible for the said commission to now make an intelligent estimate of the benefits, if any, which accrued to said lots and parts of lots six years ago when the said street was opened, or determine what part of any enhancement in the value of said lots, since occurring, if any, is due to the subsequent installation and operation of an electric street car line along said street as extended, and to the natural and normal growth of the City of Washington in that direction.

37 5. That changes in the title of said lots during the six years elapsed since these proceedings were instituted should have been considered by the said jury or commission, and its failure so to do will lead to endless confusion.

6. That this cause has not been proceeded with in this Court in accordance with the directions of the Court of Appeals, and this Court could not properly have proceeded except as so directed and by submitting the matters at issue to a jury of twelve.

7. That the petitioners, the Commissioners of the District of Columbia, have taken and perfected in this case two appeals to the Court of Appeals from final orders passed herein, neither of which has been disposed of, and this Court is without jurisdiction to proceed in the matter pending said appeals.

8. That these exceptants have interposed the plea of the Statute of Limitations in bar of any further proceedings in this cause, which plea is undisposed of, although the same should have been considered and sustained by the Court.

9. That the commission or jury which returned said finding or verdict, was not chosen and summoned as required by law, but was illegally constituted.

10. That said jury or commission was not sworn as required by law.

11. That said verdict or finding was predicated of errors on the part of the presiding Justice in granting and refusing certain

38 instructions asked by the respective parties, as to which exceptions were noted at the time.

12. That said verdict or finding was wholly in disregard of the evidence submitted by these exceptants and other respondents.

13. That the said jury or commission declined to receive certain evidence offered by these exceptants, and was sustained therein by the Justice presiding.

And these exceptants pray that the proofs offered before the jury or commission, which were taken down stenographically, may be ordered to be filed as a part of the record of the cause, and considered at the hearing of these exceptions.

SAM'L MADDOX,
Attorney for Exceptants.

Motion of Rosa Wallach and Others to Set Aside so Much of Verdict of June 6, 1906, as Affects Lot 9.

Filed July 6, 1906.

In the Supreme Court of the District of Columbia, Holding a District Court.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET. No. 556.

And now come Rosa Wallach, Emily Neville Wallach, Mary Alexander Mitchell and Rose Douglass Merriam, owners of part of lot 9 in Block 17 of Todd and Brown's Subdivision, and move
39 the Court to vacate and set aside so much of the finding of the commission of seven, filed herein on the 6th day of June 1906, as affects said lot 9 for the reason that the assessment levied against it, to wit, the sum of $2,000. is grossly unjust, unreasonable, exorbitant and excessive, and out of all proportion to any possible benefit resulting to said lot from the extension of Eleventh Street.

And these respondents file herewith and attach hereto the affidavit of Henry Rozier Dulany, which they pray may be read at the hearing of this motion and in support thereof.

SAM'L MADDOX,
Attorney for Respondents, Rosa Wallach and Others.

Affidavit of Henry Rozier Dulany.

DISTRICT OF COLUMBIA, *ss:*

I am, and for fifteen years have been, engaged in business in the District of Columbia as a real estate agent and broker and as such I have had general charge, as well before as since the year 1901, of lands lying on the northern suburb of the city belonging to Mrs. Rosa Wallach and the late Jesse Brown and being in what is known as Todd and Brown's subdivision. Lot 9 in Block 17 of said subdivision, before a part of it was taken for the extension of Eleventh St., had a frontage of to wit 37 feet on Kenyon or Marshall St., of which frontage 19 feet were taken for said extension leaving the street front on said street but a few inches more than 17 feet.
40 As such it is almost a triangle, and is not available for any sort of subdivision without great loss of ground.

For the part of said lot taken for said extension the District paid, and the owners were willing to take sixty cents per square foot, presumably therefore the then market value of the ground. But at no time since then, although I have made every reasonable effort to sell said lot, have I been able to secure an offer of sixty cents per square foot, nor has anything happened that would justify any one in believing that the said lot was benefited by reason of said extension. Yet the commission recently to assess benefits against nearby lands

by reason of the Extension of Eleventh — have assessed against the said part of lot 9 the sum of $2000. or at about the rate of 25 cents per square foot.

In the opinion of this petitioner the assessment of 25 cents per square foot, levied by the commission, is unjust, unreasonable, extravagant, excessive and strongly leans to confiscation.

HENRY ROZIER DULANY.

Subscribed and sworn to before me this 5th day of July, 1906.

[SEAL.] ROB'T E. P. KREITER,
Notary Public, D. C.

41 *Opinion.*

Filed May 6, 1907.

In the Supreme Court of the District of Columbia, Holding a District Court.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET. No. 556, District Court.

On March 3, 1899, Congress passed an act entitled "An act to extend S street, in the District of Columbia, and for other purposes." 30 Statutes at Large, 1344. Among the other purposes, section 3 of said act provides that the Commissioners are authorized and directed to institute, by petition, a proceeding to condemn the land necessary for the extension of Eleventh street northwest, on a straight extension of lines thereof, as now established in the city of Washington, with a width of 90 feet from Florida Avenue to Harvard street, and thence with the same width, and in a straight line, to Lydecker avenue joining said avenue, with its center line opposite the center line of Eslin avenue.

The said act provided for the selection of a jury, and other proceedings, for the condemnation of the land necessary for said extension, under and according to the provisions of Chapter 11 of the Revised Statutes of the United States, relating to the District of Columbia, Sections 246-270, Revised Statutes of the District of Columbia.

Said section 3 provided that when the amount of damages should be found, that the jury in such proceeding should assess at least one-half of said amount against the land abutting on that portion of the street to be opened, extending to a depth of 200 feet from the building lines of said Eleventh street, as extended.

Section 9 of said act provides that payment of the awards made in respect to the property condemned shall not be made until the assessments provided for shall have been made against the aforesaid property and duly confirmed.

Section 257 of the Revised Statutes relating to the District of Columbia provides for the summoning of a jury of seven judicious,

disinterested men, not related to any party interested, to assess the damages.

Section 7 of the act of March 3, 1899, modifies the said highway condemnation act contained in the said Revised Statutes in some respects, section 7 providing that the sums to be assessed against each piece or parcel of ground shall be determined and des-
42 ignated by the jury taking into consideration the situation of said lots, and the benefits that they may severally receive from the opening of said streets; and when the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof, from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made on or against that part of such lot as is not taken, as hereinbefore provided.

A jury was summoned by the marshal and proceeded to award damages and benefits for the said extension of Eleventh street under the authority of the said statutes; and on February 16, 1900, returned their verdict to the court; and an order *nisi* was passed on the 19th day of March, 1900, confirming the said verdict, unless cause to the contrary should be shown on or before the 19th day of April, 1900. Protests against such confirmation, or exceptions thereto, were filed by a number of parties interested: and finally, after hearing these objections, and after an amendatory law had been passed by Congress on June 6, 1900 (31 Statutes at Large, 665), the court, on July 3, 1900, signed a decree confirming the award of damages for the land condemned for the extension of Eleventh street, and directing payment of the several sums found to be due for such lands, in accordance with the act of March 3, 1899, and the amendments thereof, approved June 6, 1900; and further decreeing that the assessment of benefits made by the said jury should be set aside as null and void.

From so much of the said decree as declared the assessments for benefits to be illegal, null, and void, the petitioners, the Commissioners of the District of Columbia, took an appeal to the Court of Appeals. This case was docketed in the Court of Appeals as No. 1039, and was entitled, "John B. Wright *et al.*, Commissioners, etc., against Eugene Byrnes *et al.*," and later became known as "Henry B. F. Macfarland *et al.*, Commissioners, etc., *v.* Said Byrnes *et al.*," Commissioner Wight's term of office having expired, and said Macfarland having been appointed in his place. This case came on for hearing in the Court of Appeals, and on April 1, 1902, that court, in an opinion delivered by Mr. Justice Morris, reversed the decree appealed from, and remanded the cause to this court, with directions to vacate such part of said order, and for such further proceedings in the cause according to law, as may be right and just. This case is reported in 19 Appeals D. C., 531: 30 Wash. Law Rep., 237.

The case was thereupon appealed by the Commissioners to the Supreme Court of the United States, which appeal was dismissed by said court, at the October term, 1902, Mr. Justice Shiras delivering the opinion of the court, reported in 187 U. S., 246. The reason

for dismissing the appeal was that the decree of the Court of Appeals, reversing the order of this court, and sending the case back for further proceedings, was not a final decree. Thereupon the mandate of the Supreme Court was sent down to the Court of Appeals, and the mandate of that court sent to this court and filed herein on July 22, 1903. This mandate says:

"You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

On November 13, 1903, the petitioners filed a motion to ratify and confirm the said verdict as to the assessment for benefits in conformity with the said mandate of the Court of Appeals. Nothing further appears to have been done in the case until March 4, 1904, which was in the January term, when the court signed a decree vacating the decree which set aside the said assessment for benefits, in accordance with said mandate; and, thereupon, on further hearing the case on the said motion of the said petitioners for confirmation of the said assessment for benefits, according to the verdict of the said jury of seven, and after argument by counsel for the parties, and due consideration of the exceptions of the respondents, from which it appears to the court that they and each of them were dissatisfied with said verdict, it was by the court ordered that the said motion to confirm be, in all respects, overruled; and further, that in case the petitioners desired to proceed further in the premises, that they should within a reasonable time make application to the court for directing the marshal to summon a jury of twelve, as provided by law. The petitioners entered an appeal from that decree, which was never perfected.

On June 17, 1904, being at the same term, the court signed another order, recited to be upon consideration of the proceeding herein, and the motion filed by Abner Greenleaf, and others, which modified the order of March 4, by ordering the petitioners to proceed within sixty days from that date, in the matter of the reassessment of benefits herein, in accordance with the terms and provisions of the said act of Congress, approved June 6, 1900. In pursuance of said last order, and by leave of the court, the said petitioners, the Commissioners of the District of Columbia, on August 9, 1904, filed an amended and supplemental petition, in which they set forth, first, the filing of the original petition herein on May 31, 1899, pursuant to the said act of Congress of March 3, 1899; second, the order directing the marshal to summon the jury to assess the damages and benefits, by reason of the said extension of Eleventh street, under the said act; third, that the jury was summoned and empaneled, and cation *nisi*, and the final order on July 3, 1900, confirming the verdict on February 16, 1900; fourth, the signing of the order of ratification *nisi*, and the final order on July 3, 1900, confirming the cerdict as to the award for damages, and vacating the same as to the assessment for benefits; fifth, reciting the appeal to the Court of Appeals, and the order of reversal therein; sixth, reciting the said order

of March 4, 1904, in this court, from which it appeared that the exceptants were dissatisfied with the said verdict; seventh, referring to the said act of June 6, 1900; and, eighth, referring to the said order of June 17, 1904, directing them to proceed within sixty days, under the said act of June 6, 1900.

On February 6, 1906, a motion was filed by George S.
43 Cooper, by his attorney, Leo Simmons, to strike out the said amended and supplemental petition of the Commissioners, because the same was improvidently filed, and because it was filed without authority of law, and because the court had lost jurisdiction over the parties, and their successors or assigns could not be brought into court under such a proceeding. A motion was also filed by the respondents represented by Mr. Simmons, on the same day, to dismiss the said amended petition for want of prosecution. February 6, 1906, both of these motions were overruled by the court, without prejudice.

On October 27, 1904, an order of publication was made, pursuant to the order passed herein on June 17, 1904, and the provisions of the said act of June 6, 1900, and reciting that the petitioners had filed the said amended and supplemental petition, and requiring all persons interested to appear herein on or before November 28, 1904, and to continue in attendance, etc. Said order was published in the Washington Law Reporter, the Evening Star, the Washington Post, and the Washington Times, and proof of publication thereof was filed on February 9, 1906. On the same day the court passed an order directing the marshal to summon a jury of seven to reassess the benefits resulting from the extension of Eleventh street, in accordance with the said act of June 6, 1900.

Thereafter, to wit, on February 16, 1906, Mr. George S. Cooper, by Leo Simmons, his attorney, filed a renewal of his motion to strike out the said amended petition, filed on August 17, 1904, for the same reasons contained in his prior motion, and on March 9th the said motion was overruled by the court, reserving to the respondents the right to interpose such defenses as they could have had if the suit had been begun anew.

On March 16, 1906, the jury was accepted and sworn, in accordance with the provisions of the said act of June 6, 1900, and they were ordered to view and examine the land affected by the proceedings herein, and to proceed, on the 28th of March, 1906, at 2 o'clock p. m., and from time to time thereafter, in the United States courthouse, but without the presence of the court, to hear the evidence, and thereafter to assess the benefits to the lands benefited by the said extension of Eleventh street, in accordance with the said act.

Thereafter, certain of the owners filed pleas in bar to the said amended and supplemental petition, based on the statute of limitations, and averring that the cause or right of action in said petition set forth, did not accrue within three years next before the filing of said suit, or supplemental petition. Some of them also filed pleas in bar, claiming thereby that no proceeding could be taken under the act of June 6, 1900, but that a reassessment of benefits, if any, could only be had under the said act of March 3, 1899, and by a

jury of twelve. These pleas were not disposed of by the court, but remained in the case, to be considered at the final hearing, after the jury should have reported a verdict.

On May 31, 1905, the parties represented by Mr. Simmons filed a motion to discharge the jury, on the ground that it was illegally constituted, because the members had not been selected and summoned by the U. S. Marshal of the District of Columbia, as required by law. That motion was overruled on the same day, without prejudice to the respondents to have the same considered on hearing of the motion for confirmation of verdict when rendered.

The jury returned its verdict, assessing the benefits, on June 6, 1905; and thereafter, the respondents filed numerous exceptions to the said verdict, stating various grounds of objection. On December 21, 1906, the petitioners filed a motion to finally ratify and confirm the verdict and assessment, notwithstanding such exceptions filed. That motion was continued for hearing from time to time, until it was argued and submitted to the court in February, 1907.

Counsel for respondents contend that the jury was illegally constituted, because the members of it had been selected and summoned by the deputy marshal instead of by the marshal in person.

I am not able to see that the act of June 6, 1900, authorizing the marshal of the District of Columbia to summon jurors, requires that he should do this personally. The law authorizes him to have deputies (sec. 186, Code, and secs. 780, 782, R. S. U. S.), thus seeming to recognize the fact that his duties are so numerous and so variant that it would be impossible for him to perform them all personally.

Section 4 of the said act says that the jurors are to be summoned by the marshal of the District of Columbia, and does not say, "or by his deputies," although those words are used in the preceding section. That fact is not conclusive in my mind that the lawmakers intended the jurors should be summoned by the marshal personally.

The language used for the summoning of grand and petit jurors in this District is similar to that used in said section 4, as will be seen by sections 210 and 211 of the Code, and by section 209, under certain contingencies, the court is authorized to direct the marshal to summon talesmen. In neither of these sections is any reference made to the deputy marshal, and yet it will hardly be contended that the marshal may not properly discharge the duties required of him by these sections, by his deputy or deputies.

Section 4 of said act of June 6, 1900, provides that before accepting the jury, the court shall hear any objections that may be made to any member thereof, and shall have full power to decide upon all such objections, and to excuse any juror, or cause any vacancy in the jury, when empaneled, to be filled; and it appears in this case that notice was given to the counsel for the respondents, of the time and place when the said jury would appear for acceptance, and to be sworn, and give directions when and how to proceed with their duties; and at that time a number of counsel were present, and had the opportunity, if they so desired, to object to any of the said jurors, or to question any of the said jurors, as to their qualifications

for service in this proceeding; and if said counsel chose to allow the said jurors then to be accepted and sworn, without raising any objections, because of the manner of their selection, or be-
44 cause of any technical reason, it seems to me that they waived such point, and they would be afterward estopped from raising the same; and especially after going before such jurors, and offering testimony on the merits of the proceeding. The notice which appears to have been given to the various attorneys for respondents contained the names of the jurors, and the fact that they were selected under the provisions of the act of June 6, 1900, and that the court would be requested to empanel and swear said jury at 10 o'clock a. m., on March 16, 1906.

The counsel also object to the form of the oath that was administered to said jury, the record disclosing that they were sworn in accordance with the provisions of the said act of June 6, 1900. The court must presume that all the provisions of said act, so far as the oath was concerned, were complied with, in the absence of any definite contradiction of the record.

It might also be said that the said order of March 16, 1906, accepting the said jury, and reciting that the said jurors were summoned by the marshal, would preclude the contention thereafter in this proceeding, and with no change of circumstances, that such was not the fact. Every presumption would be in favor of the varity of said order.

Counsel for respondents contend that the Statute of Limitations, which is pleaded, debars the District of Columbia from the right of having any of the benefits, occasioned by the extension of Eleventh street, assessed against the property benefited, the argument being that the act of June 6, 1900, gave the District the right to proceed at once to have the assessment made, and that unless the municipality did proceed within three years from that date, it would be barred by the general Statute of Limitations. It seems to me that the District of Columbia had the right to take the opinion of the Court of Appeals, and of the Supreme Court, on the question of the propriety of the order passed in this court, vacating so much of the said verdict as assessed benefits, before it should be called upon to institute any new proceeding to reassess the said benefits. So that if the Statute of Limitations is applicable at all in this case, upon which question the court does not now desire to express any opinion, the earliest time when the statute began to run would seem to be July 22, 1903, when the mandate from the Court of Appeals was filed in this court.

Thereafter, it appears, this court signed the order of March 4, 1904, overruling the motion to confirm the former verdict, on the ground that the exceptants were dissatisfied therewith, and giving the District Commissioners leave to proceed within a reasonable time, to apply for a jury of twelve. On June 17, 1904, the court seems to have considered this order indefinite or undesirable, and on motion of some of the exceptants, ordered the Commissioners to proceed within sixty days from the date, under the provisions of the said act of June 6, 1900, this order taking the place of the order of March 4, 1904, so far as giving leave to proceed with the reassessment is

concerned. Thereupon, the Commissioners did proceed, by filing said amended and supplemental petition within the said sixty days, and obtaining the order of publication on October 27, 1904, and finally, after considerable delay, securing a jury to make the reassessment of benefits, as provided by the said act of June 6, 1900.

While the Commissioners may be charged with moving slowly, and while they might have been more expeditious in pursuing the said proceeding, after filing their said amended petition, such delay could not amount to a bar, and I am, therefore, disposed to hold that the pleas of the Statute of Limitations, interposed by the several exceptants, are not well founded in law or fact, and that they afford no ground for refusing to confirm the verdict of the jury. I am also of the opinion that the pleas in bar which raise the question of the necessity of proceeding under the said act of March 3, 1899, and by a jury of twelve, must be overruled, and that the verdict must be considered on its merits.

The act of June 6, 1900, substituted a different proceeding, and thereby gave the Commissioners a choice of proceedings, if it did not by implication repeal the former act. Congress need not wait for the constitutionality of an act to be questioned in the courts before repealing or adding to the same. If a new law is passed, while such question is pending in court, and the old law is finally held to be constitutional, that judicial decision will not repeal the new law and reenact the old law.

It is contended by counsel for the respondents that the Court of Appeals in the said case of Macfarland *v.* Byrnes, decided that the respondents had a right to have a jury of twelve, and to proceed under the act of March 3, 1899, if they should so elect, and that the fact that the said act of March 3, 1899, had been held to be unconstitutional by the Court of Appeals would not be sufficient to set in motion the instrumentalities of the act of June 6, 1900, for reassessment. The last part of this contention is no doubt correct, but it does not follow, when the respondents decline to accept the verdict of the jury, under the act of March 3, 1899, that they can still claim a right, or that it is the only method left open by the law for them to have a jury of twelve and proceed under that law.

The act of June 6, 1900, authorizes and directs the Commissioners of the District of Columbia to apply to this court for the final ratification and confirmation of the award of the jury, in respect to the damages for the lands condemned for the said extension of Eleventh street; and when said award is ratified said act provides for the payment of the said damages in accordance with the said act of March 3, 1899, "anything in said act to the contrary notwithstanding." This portion of the act of June 6, 1900, certainly changes the former law, section 9 of which prevented payment for damages until assessment for benefits had been made and confirmed. It is possible for the award of damages to be confirmed and the damages paid, without respect to the confirmation of the verdict assessing the benefits, under the said act of June 6, 1900, and such separation did in fact take place.

The award for damages was confirmed and the money paid, while

the verdict, in so far as it assessed benefits, was vacated. It
45 turns out that the vacation of that portion of the verdict was erroneous, because it was based on the theory that the law, so far as such benefits were concerned, was unconstitutional; but when the constitutionality of the said act, in respect to said benefits, was determined by the courts, the said order vacating the said assessment was set aside, leaving the verdict to stand so far as that objection was concerned. Thereupon the said verdict assessing benefits came again before this court for final confirmation, when it was made to appear to the court that each of the respondents or acceptants was dissatisfied with said verdict, on its merits. Whereupon, instead of confirming the verdict, the court overruled the motion to confirm; and it first undertook to hold that the Commissioners might proceed under the act of March 3, 1899, by having the marshal summon a jury of 12; but the Commissioners, not taking any step to proceed under the said act, by virtue of said order, the court, a little over three months later, but during the January term, passed the order of June 17, 1904, ordering the Commissioners to proceed within sixty days, in accordance with the act of June 6, 1900, thereby in effect setting aside or modifying its former order *pro tanto*.

It seems to me that this was competent for the court to do, on the theory that the dissatisfaction with the former verdict having been expressed by the property owners affected thereby, and insisted upon hearing the motion to confirm the said verdict, the court had no alternative but to refuse to confirm the verdict; and such refusal to confirm, and overruling of the motion to confirm, was, in effect, an adjudication by the court of the invalidity of the said verdict, because the order was accompanied with the permission to proceed again to obtain a new jury; and when the said order of June 17, 1904, was passed, it seems to me it was warranted by the provision of the act of June 6, 1900, which provided in the event that the assessment for benefits should for any reason be declared void, the Commissioners were authorized and directed to apply to the court for a reassessment of such benefits, in accordance with the provisions of the said act of June 6, 1900.

I do not understand that the Court of Appeals intended by the language used in the said case of Macfarland *v.* Byrnes to hold that such order and such proceeding would be improper. The Court of Appeals expressly refused to direct what the proceeding should be in this court, leaving the land owners the privilege of accepting the said verdict for assessment of benefits if they so elected; and on the other hand, if they elected to contest the matter further they were to have the opportunity to do so according to law.

If the act of March 3, 1899, had not been held to be constitutional, there could have been no proceeding for a reassessment of benefits under that law, or the act of June 6, 1900, either, for the foundation for the whole proceeding would have dropped out.

But when the law of March 3, 1899, was held to be constitutional, and when the act of June 6, 1900, modified it by providing for the separation of damages and assessments in the manner indicated; and when the effect of the subsequent order of the court was to ad-

judicate that the verdict making the assessment of benefits was void, because objected to by the land owners, then there seems to be no further method left for a reassessment than to follow the provisions of the act of June 6, 1900, because so far as that act is inconsistent with the act of March 3, 1899, it must necessarily repeal the former act; and it is inconsistent in several particulars, notably that of requiring a jury of seven instead of twelve, and in the matter of the oath of the jurors as to the assessment of benefits, and as to the land upon which said benefits could be assessed, and also as to the amount of such benefits.

Another contention is made by some of the exceptants that when this court overruled the motion to confirm the said verdict assessing the benefits, all the parties were out of court, and that no further proceeding could be built upon the record made up to that time, because the court had lost jurisdiction. I can not agree with this contention, for the parties had been properly brought into court in the said original proceeding, under the act of March 3, 1899, and they continued in court until the final determination of that proceeding, and when the court refused to confirm the said verdict and set it aside, by overruling the motion to confirm, and giving the Commissioners leave to proceed further, the land owners were obliged to take notice of that order; and when the amended petition was filed and publication ordered and made under that, any other parties interested in the proceeding, which had been modified by the act of June 6, 1900, were given an opportunity to come in, and they did appear before the jury and submit evidence concerning the alleged benefits to their lands by reason of the extension of said street. Such appearance and participation in the trial before the jury, it seems to me, estops them from raising any question as to the jurisdiction by the court over the persons of the parties interested.

As to the argument that there could not be a reassessment which would extend over a greater area than that provided by the act of March 3, 1899, I hold that the act of June 6, 1900, expressly authorizes a reassessment of the benefits under the terms of said act; and that no contrary construction can be given to the act, by reason of the word "reassessment," although the assessment now in question may be more properly designated a new assessment, or a second assessment, rather than a reassessment. The law must be construed to carry out the evident meaning of the law makers, expressed by the words used in the statute being construed, and by the situation of the subject-matter of the law at the time it is enacted. Congress evidently contemplated that the award for damages might be confirmed and paid, and that the court might find the verdict assessing the benefits to be objectionable, and might refuse to confirm it; and when they passed the act of June 6, 1900, they were undertaking to provide a remedy for that situation, if it should arise.

Counsel contend that the assessment area provided for by the act of March 3, 1899, of two hundred feet on each side of said
46 Eleventh street, is the only area against which benefits can be assessed, under the act of June 6, 1900. I do not so construe the said act.

The first part of section 12, act of June 6, 1900, provides that certain sections of the act are made applicable to the several acts of March 3, 1899, entitled, "An Act to extend S street in the District of Columbia, and for other purposes," and "An Act for the extension of Pennsylvania avenue southeast, and for other purposes," *in so far as the same relate to the extension of Sixteenth street northwest, Pennsylvania avenue southeast, Staughton street, Eckington Place, Fifth street, and Howard avenue, except* that the assessment areas fixed by said several acts in reference *to said several streets* shall be and remain as in and by said acts of Congress provided. This language limits the application of that provision or exception as to the assessment areas to the six several streets or avenues named in said section; but the latter part of that section provides what shall apply to Eleventh street, namely, that if the assessment made by the former jury under the act of 1899 is for any reason declared void, then the Commissioners are authorized to apply for a second assessment of benefits under the said act of 1900—that is, without any exception or limitation as to the assessment areas.

A number of exceptions have been filed by the Garfield Memorial Hospital, against which the jury assessed $6,700, being on land fronting 562.48 feet on Eleventh street, and running back a depth of 200 feet. It is claimed by counsel for the hospital, that the correct name of the hospital is the Garfield Memorial Hospital, and that the jury has only called it the Garfield Hospital. Taking into consideration the location of the hospital, and its general name, and the description of its land as facing on Eleventh street, I can see no difficulty by reason of the word "Memorial" being left out of the neme in the assessment of the jury, as it evidently refers to the Garfield Memorial Hospital.

The depth of the land, 200 feet, takes the portion on which the assessment is levied back of the ground said to have been obtained by the hospital by the deed of M. H. Schneider, of April 30, 1903, recorded in Liber 2725, folio 268, at the northern boundary; but I do not understand that it is claimed that the hospital does not own ground having a frontage of 562.48 feet on Eleventh street, and running back that depth 200 feet, although it holds the title under other deeds. I can see no reason why, if the ground was subject to assessment for benefits, that the assessment by the jury of the amount specified on the land specified, might not be valid.

The hospital urges that it is exempt from taxation for any purpose, and that, if assessments were made, under the terms of its title it would not be liable for a special assessment for benefits; but that the Commissioners of the District would be obliged to assume the same, and protect the hospital from any cost or expense by reason thereof. This may be true, but the court, sitting as a District court, does not appear to have jurisdiction to decide the question.

The statute directs the jury to assess the benefits on the pieces or parcels of land benefited by such extension, and the amount of the assessment for such benefits against the same; and the court has power to hear and determine objections filed to the verdict and award, and to set aside or vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable; but there seems to be no

jurisdiction given the District court thereby to say what lands, if any, are exempt; and no discretion appears to be given to the jury to leave out of their consideration any lands because the title to the same may be in a hospital, or even in the municipal government, or in any church society, or other institution which might be exempt from taxation.

If the hospital is exempt, or if the District Commissioners, under the tenure by which the hospital holds the said lands, are obliged to assume the assessment, then that question can be disposed of after confirmation of the verdict; and, therefore, without deciding whether the hospital is required to pay these assessments, or is exempt from them, I am constrained to overrule the exceptions and to confirm the award, notwithstanding the argument of counsel in behalf of the hospital.

Other exceptions by various owners of property are filed, all of which I may perhaps dispose of generally, without making special remarks relating to each individual case. In brief, the objections are, that the jury assessed benefits caused by the extension of the railroad and the building of houses and other improvements in the neighborhood, and that they did not and could not have confined their assessment of benefits to the actual increase in value of the lands occasioned by the extension of Eleventh street only; and that for that reason the whole assessment should be set aside.

There are some difficulties, to be sure, in getting at exact justice in any case of this kind. The jury were fairly instructed what their duty was, and they honestly, in my judgment, endeavored to perform that duty. Being relieved from the necessity of confining the assessment area to the 200-feet strip on each side of the street, they have in some instances gone beyond that, and they have also been relieved of the necessity of assessing any special amount, and have been told to assess benefits only where benefits existed, and to the extent of their existence caused by the extension of the street. The fact that they had to look backward instead of looking forward to judge these benefits may not have been more difficult than in the ordinary case to assess benefits before they have actually accrued to the lands, because in either case there must be some latitude given for the exercise of judgment.

Again it is claimed that the subdivisions made since the street was extended have affected the assessments wrongfully, because there have been combinations by which owners of lots have subdivided land and made the lots now front on Eleventh street which before were not fronting on Eleventh street, and that no benefits should be assessed to those lands because of the purchase and subdivision since the street was extended. It may be true, and it therefore is presumed, that such is the case, but I am unable to see that the combination or subdivision of the lands made since prevents the jury from saying that the lands themselves were benefited by the ex-
47 tension of the street, even if no such changes had been made.

If the subdivision or combination had not been made, the jury could possibly still have assessed the ground on the supposition that it would be made, because such subdivision or combination would be the most advantageous use that could be made of the prop-

erty, and it might be presumed that the interest of the owners of the various properties benefited would induce them to make such use of it.

At any rate, I am unwilling to disturb this verdict, by reason of any claims made by individual owners as to the amount of the assessment, because while it may be true that exact justice would require a few dollars more or less to be taken off of some lots, and a few dollars more or less to be added to other lots, still it is the office of the jury to fix that amount, and unless that duty has been performed in such a way as to convince the court that the assessment is unreasonable and unjust, the court would not undertake to disturb the verdict and require a new jury to make a reassessment.

If a new jury was empaneled at this time, it would still be further from the date of the extension of the street, and the new jury would be perhaps more embarrassed than the present jury has been in ascertaining the exact amount of benefit to the neighboring lands, caused by the extension of the street.

On the whole case, therefore, I am disposed to overrule all the exceptions, and sign a decree confirming the verdict of the jury.

JOB BARNARD, *Justice.*

48 *Order Finally Ratifying and Confirming Verdict of Jury.*

Filed May 6, 1907.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF ELEVENTH STREET NORTHWEST, IN THE DISTRICT OF COLUMBIA. No. 556, District Court.

Upon motion of the Commissioners of the District of Columbia, the petitioners in the above-entitled cause, it is, by the court, this 6th day of May, A. D. 1907, adjudged, ordered and decreed, that the verdict and assessment of the jury returned and filed herein on the 6th day of June, A. D. 1906, be, and the same is hereby, finally ratified and confirmed, in all respects, notwithstanding the objections and exceptions filed thereto, which are hereby overruled.

By the Court:—

JOB BARNARD, *Justice.*

49 *Motion of Rosa Wallach and Others for Allowance of Appeal.*

Filed May 14, 1907.

In the Supreme Court of the District of Columbia, Holding a District Court.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET. No. 556.

And now come respondents Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell and Rose Douglas Merriam, by their attor-

neys, and pray an appeal from the order passed herein on the 6th day of May, A. D. 1907, confirming the verdict of the jury found and filed in this cause on the 6th day of June, A. D. 1906.

MADDOX & GATLEY,
Attorneys for Respondents.

Appeal allowed, and bond for costs fixed at one hundred dollars.

JOB BARNARD, *Justice.*

Memorandum.

May 27, 1907.—Appeal bond filed.

50 *Order for Severance on Appeal of Rosa Wallach and Others.*

Filed June 3, 1907.

In the Supreme Court of the District of Columbia.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET. No 556.

This cause coming on for hearing on motion of Rosa Wallach and others for an order of severance, authorizing them to prosecute this appeal by them taken in this cause on the 14th day of May 1907, it is this 3d day of June A. D. 1907, ordered that said Rosa Wallach and Emily N. Wallach, Mary Alexander Mitchell and Rose Douglass Merriam be and they are hereby authorized to prosecute their said appeal without regard to other persons interested in these proceedings.

By the Court:

JOB BARNARD, *Justice.*

Order Making Bill of Exceptions Part of Record.

Supreme Court of the District of Columbia.

FRIDAY, *June 7th*, 1907.

Session resumed pursuant to adjournment, present presiding, Justice Job Barnard.

51 IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET.
No. 556.

Now comes here Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell and Rosa Douglass Merriam, and tender to the Court their bill of exceptions taken during the trial hereof, and pray that the same may be duly signed and made part of the record, now for then, which is accordingly done.

52 *Bill of Exceptions.*

Filed June 7, 1907.

In the Supreme Court of the District of Columbia, Holding a District Court.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET. No. 556.

The bill of exceptions of Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell, and Rose Douglas Merriam, respondents, to the proceedings under the amended and supplemental petition of the Commissioners of the District of Columbia, filed herein on the 9th day of August.

Be it remembered that after the jury was sworn in this proceeding to assess benefits to abutting and adjoining lands by reason of the extension of Eleventh Street, as authorized by the act of Congress approved March 3, 1899, and before it entered upon a consideration of the matters involved in the said amended and supplemental petition, the said respondents interposed the following pleas to said petition:

"And now come respondents Rosa Wallach, and Emily N. Wallach, Mary Alexander Mitchell and Rose Douglas Merriam, devisees of Jesse Brown deceased, and for pleas to the amended petition of the Commissioners of the District of Columbia filed herein on the 9th day of August, 1904, say:

"1. That the verdict of the jury of seven filed herein on the
53 9th day of May, 1900, became and was a nullity as to lots then owned by respondent Rosa Wallach and the said Jesse Brown, then in life, on the filing by them in this cause of exceptions to said verdict, and that a reassessment of benefits, if any, to said lots can only be had under and in accordance with the act of Congress approved March 3, 1899, under which the proceedings in this cause were instituted, and that no proper step has or could have been taken in this cause since said proceedings were so instituted to set in motion the instrumentalities of the act of June 6, 1900, under which said petition was filed.

"2. And for a further plea these respondents say that the cause of action set up in said petition filed as aforesaid on the 9th day of August, 1904, did not accrue within three years next before the filing thereof.

"Wherefore these respondents pray judgment if the said Commissioners of the District of Columbia ought to have or maintain their aforesaid action against them predicated of the said petition filed in this cause on the 9th day of August, 1904."

But the Court, of its motion, overruled said pleas, to which action of the Court the said respondents, and each of them, by their counsel, then and there excepted, and prayed the Court to note the same upon its minutes, which was done.

After the jury was sworn in this proceeding, as aforesaid, and before it entered upon a consideration of the matters entrusted
54 to it, the Court, at the instance and request of the Commissioners of the District of Columbia petitioners, gave the following instruction:

"It is the duty of the jury to consider and assess the benefits which have resulted to the pieces or parcels of land on each side of Eleventh Street, Northwest, as extended from Florida Avenue to Lydecker Avenue, and the benefits which have resulted to any and all other pieces or parcels of land from the said extension; and in determining the amounts to be so assessed against said pieces or parcels of land, the jury shall take into consideration the respective situations of the said pieces or parcels of land, and the benefits that they have severally received from the extension of said Eleventh Street. By extension of the streat the jury are to understand its establishment, laying out, and completion for all the ordinary uses of a public thoroughfare, or highway.

To which instruction the said respondents, at the time it was requested and before it was given, by their counsel, severally objected; and upon the overruling of said objections, and to the giving of said instruction, the said respondents, and each of them, by their counsel, then and there excepted, and prayed the Court to note the same upon its minutes, which was done.

And the said respondents, by their counsel, requested the Court to give the jury the following instructions, and each of them:

1. The jury are instructed that in ascertaining whether or not any benefit has accrued to any piece or parcel of land abut-
55 ting upon Eleventh Street extended, or in the vicinity thereof, they shall not take into consideration any benefit which they may find has accrued to such land subsequent to the laying out and establishing of said street. That is to say, that in levying assessments for benefits, if any the jury shall find, they shall not take into consideration the grading or paving of the street, nor any improvements or street car facilities thereon subsequent to the laying out of the street. In other words, the jury must find that the benefit upon which an assessment is based was the direct result of laying out and establishing the street, and not the result of improvements since made either in or upon the street itself, or abutting nearby lands.

"2. In estimating the benefits, if any, accruing to lands abutting upon and near Eleventh Street as extended, by reason of such extension, the jury should take as a standard of value the price paid per square foot for the lands condemned for the extension of said street, and for that purpose a certified copy of the award of damages for lands so taken, as set forth in the verdict of the jury filed herein on the 20th of February 1900, may be offered in evidence.

"3. In estimating the benefits, if any, accruing to lands abutting upon and near to Eleventh Street as extended, by reason of such extension, the jury may consider in connection with such other evidence as may be offered by the several parties in interest, the prices paid per square foot for the lands condemned for the extension of

said street, and for that purpose a certified copy of the award
56 of damages for lands so taken, as set forth in the verdict of the jury filed herein on the 20th day of February, 1900, may be offered in evidence.

"4. Such special improvements as water mains, sewers, curbs, gutters and sidewalks are usually assessed in other proceedings, and of course, any enhancement in value arising from that character of improvements and the macadamizing of the street in question, or any street crossing same, should not be taken into consideration as a basis of benefit in this case.

"5. The jury are instructed that in estimating what benefits, if any, have accrued to any piece or parcel of land abutting upon or adjacent to said Eleventh Street, they are not at liberty to take into consideration any enhancement in value or benefit that has been given or accrued to such land by the grading of said street nor macadamizing the roadway of same; nor have they the right to base their assessments for benefit upon any enhancement in value, if they find any, brought about by the laying of sidewalks, sewers, water-mains, gutters or curbs that have been placed in or upon said street: their sole right to levy an assessment against any piece or parcel of such land must be founded upon such benefits, if any, as have accrued to the land from the extension of the street only. And what is meant by extension is the condemnation of the land for public uses and locating said street by demarcation and boundaries and placing same upon the maps and plans of the District of Columbia as a public highway.

But the Court refused to give said instructions, or any of
57 them, to which refusal of the Court in each instance the said respondents, and each of them, by their counsel, then and there excepted, and prayed the Court to note the same upon its minutes, which was done.

At the hearing before the jury, and after evidence had been admitted tending to show the prices at which some of said lands had been sold subsequent to the establishment, laying out and completion of said extension for all the ordinary uses of a public thoroughfare or highway, the following proceedings, *inter alia*, were had on the 26th day of April, A. D. 1906:

"Mr. MADDOX: I represent the owners of a good many lots involved in these proceedings and in their behalf desire to offer in evidence:

"First. So much of the verdict of the former jury as affects their lots, and shows the prices paid for lands taken, and the assessments as for benefits against lands not taken, or

"Second. The entire verdict of the former jury as rendered.

"Mr. SINCLAIR: If all the attorneys consent, I will agree that the entire verdict may be offered. I object to part.

"Mr. BROWN: In behalf of parties whom I represent I object to any part of the former verdict being offered in evidence.

"The CHAIRMAN: The jury declines to receive the evidence on the ground that under the instructions of the Court they are not

allowed to consider any portion of the verdict of the former
58 jury except such as relates to grade damages.

"Mr. MADDOX: I ask to have the matter certified to the Court.

"Whereupon the above ruling was certified to the Court for its action thereon."

But the Court sustained the ruling of the Chairman of the jury, and declined to admit in evidence the proffered proofs, or either of them, to which action of the Court the said respondents, and each of them, by their counsel, then and there excepted, and prayed the Court to note the same upon its minutes, which was done.

And thereupon, after the foregoing proceedings, which are hereby made a part hereof, and before the jury retired to consider of their verdict, the said respondents, and each of them, by their counsel, prayed the Court to sign and seal this their bill of exceptions and make the same a part of the record, to have the same force and effect as to each and every of the exceptions taken by the said respondents and each of them, and noted by the Court as aforesaid, as if the same had been set forth in a separate bill of exceptions signed and sealed by the justice presiding at the trial, which was granted; and accordingly, before the jury retired to consider of their verdict, the justice presiding signs and seals this the said bill of exceptions, to have the force and effect aforesaid, now for then, this 7th day of June, A. D. 1907.

JOB BARNARD, *Justice.* [SEAL.]

Settled by consent:

SAM. MADDOX,
Att'y for Rosa Wallach and Others.

J. F. SMITH,
Of Counsel for Petitioner.

June 6, 1907.

59 *Directions to Clerk for Preparation of Transcript of Record.*

Filed June 7, 1907.

In the Supreme Court of the District of Columbia.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET. No. 556, District Court.

To the Clerk:

In preparing the record for appeal of Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell and Rose Douglas Merriam from the order passed herein on the 6th day of May, 1907, please include therein the following, and no other, memoranda of the proceedings:

Petition of District Commissioners, filed May 31, 1899, with accompanying map. (Copy enclosed.)

Rule citing parties interested to appear.

Order for summoning jury of seven.

Verdict of jury of seven, filed February 20, 1900, and all entries in schedules accompanying this verdict referring to lots in Todd and Brown's subdivision, belonging to appellants, as follows: Lots 5, 7 and 8, block 12, lots 4, 5, 7 and 8, block 13, lots 4 and 7, block 14, lots 4 and 6, block 15, lots 6, 12 and 13, block 16, lots 5, 6, 7 and 9, block 17, and lots 4 and 5, block 18.

Objections of land owners to verdict. (Memorandum.)

Order setting aside verdict in part, passed July 3, 1900.

60 Appeal of District Commissioners from this order. (Memorandum.)

Mandate of Court of Appeals, filed July 22, 1903.

Order of March 4, 1904, directing the summoning of a jury of twelve.

Motion of Abner Greenleaf and others, filed June 17, 1904.

Order of June 17, 1904, directing that further proceedings be had in accordance with act of Congress approved June 6, 1900.

Amended and supplemental petition of District Commissioners, filed August 9, 1904. (Map to be furnished.)

Order warning persons interested to appear, passed October 27, 1904.

Order directing Marshal to summon jury of seven, passed February 9, 1906, and Marshal's return thereto.

Acceptance of jury. (Memorandum.)

Pleas of Rosa Wallach and others.

Verdict of jury filed June 6, 1906, and all entries in schedules accompanying this verdict referring to the following lots in said Todd and Brown's subdivision: Lots 16–23 Carpenter's subdivision, block 13; part of lot 4, by metes and bounds, and lots 46 to 53, Adam's-Manufacturing Company's subdivision, block 14, lots 4 and 6, block 15, lots 12 and 13, block 16, and lots 79 to 92 Wardman's subdivision, same block, lots 7 and 9, block 17 and lots 56 to 63, Wardman's subdivision, block 18.

Exceptions to verdict, of Rosa Wallach and others, filed July 5, 1906.

61 Motion of Rosa Wallach and others to vacate so much of verdict as affects lot 9 block 17 of Todd and Brown's subdivision, with accompanying affidavit.

Opinion of the Court, filed May 6, 1907.

Order confirming verdict, passed May 6, 1907.

Appeal of Rosa Wallach and others. (Memorandum.)

Filing of bond of Rosa Wallach and others. (Memorandum.)

Order of severance, passed June 3, 1907.

Bill of exceptions, Rosa Wallach and others.

Yours truly, MADDOX & GATLEY.

62 *Order Extending Time to File Transcript of Record.*

Filed June 7, 1907.

In the Supreme Court of the District of Columbia.

IN THE MATTER OF THE EXTENSION OF ELEVENTH STREET. No. 556, District Court.

On motion of Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell and Rose Douglas Merriam, by their attorneys, for an extension of the time within which to file in the Court of Appeals a transcript of the record on their appeal herein from the order passed in this cause on the 6th day of May, 1907, it is, this 7th day of June, 1907, ordered that said motion be, and the same is hereby, granted, and the time for filing said transcript extended to the 15th day of August, 1907.

By the Court: JOB BARNARD, *Justice.*

63 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 62, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, In the Matter of the Extension of Eleventh Street, Northwest, No. 556, District Court, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 2d day of August, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1815. Rosa Wallach *et al.*, appellants, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Aug. 3, 1907. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia.

No. 1815.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, and ROSE DOUGLASS MERRIAM, Appellants,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (Acting), Commissioners of the District of Columbia.

It appearing from an examination of the record in this case, that the Clerk of the Supreme Court of the District of Columbia in preparing the same for this Court inadvertently inserted therein the figures 150 dollars as the amount of Assessment for Benefits against part of Block 14, Todd and Brown's subdivision, whereas the true amount of said assessment is 1500 dollars.

It is therefore hereby stipulated and agreed by Mr. Samuel Maddox, counsel for Rosa Wallach, *et al.* appellants, and Mr. E. H. Thomas, counsel for Henry B. F. Macfarland, *et al.*, appellees, that the Clerk of this Court is hereby authorized and directed to change the figures from 150 dollars to 1500 dollars, not only in the original transcript as certified by the said Clerk of the Supreme Court of the District of Columbia, but also to change the printed copies thereof to be used by this Court in the hearing of the above entitled cause.

SAMU'L MADDOX,
Attorney for Appellants.
EDWARD H. THOMAS,
Attorney for Appellees.

O. K.
J. F. SMITH,
Ass't Corp. Counsel.

(Endorsed:) No. 1815. Rosa Wallach, *et al.*, Appellants, *vs.* Henry B. F. Macfarland, *et al.* Stipulation as to correction of Transcript of Record. Court of Appeals, District of Columbia. Filed Sep. 4, 1907. Henry W. Hodges, Clerk.

WEDNESDAY, *March 4th, A. D.* 1908.

No. 1815.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, and ROSE DOUGLASS MERRIAM, Appellants,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (Acting), Commissioners of the District of Columbia,

and

No. 1833.

COLUMBIA HEIGHTS REALTY COMPANY, Appellant,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (Acting), Commissioners of the District of Columbia.

The argument in the above entitled causes was commenced by Mr. Samuel Maddox, attorney for the appellants in No. 1815, and

was continued by Mr. Leo Simmons, attorney for the appellant in No. 1833.

THURSDAY, *March 5th, A. D.* 1908.

No. 1815.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, and ROSE DOUGLASS MERRIAM, Appellants,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (Acting), Commissioners of the District of Columbia,

and

No. 1833.

COLUMBIA HEIGHTS REALTY COMPANY, Appellant,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (Acting), Commissioners of the District of Columbia.

The argument in the above entitled causes was continued by Mr. Leo Simmons, attorney for the appellant in No. 1833, and by Mr. J. F. Smith, attorney for the appellees, and by Mr. Samuel Maddox, attorney for the appellants in No. 1815, and was concluded by Mr. Leo Simmons, attorney for the appellant in No. 1833.

No. 1815.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, and ROSE DOUGLASS MERRIAM, Appellants,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (Acting), Commissioners of the District of Columbia.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

This is an appeal from the judgment confirming the award of the jury assessing benefits to adjacent lands through the extension of Eleventh street. As the appeal is from the same judgment appealed from by other parties at interest, namely, Columbia Heights Realty Co., in appeal numbered 1833, the two were heard together.

The first assignment of error is thus stated: "In overruling the exceptions of appellants and confirming the verdict."

The proposition submitted on the argument on this too general and indefinite assignment, is that the assignment of benefits against lot 9 in block 17 is excessive. There is nothing in the brief bill of exceptions by which this question can be determined. None of the evidence on which the assessment was founded is before us, and we

can not undertake its determination by an inspection of the map showing the line of the street and the size and shape of the adjacent lots, which is copied in the record.

2. The second and third assignments relate to the procedure under the act of June 6, 1900, instead of the act of March 3, 1899, and to the plea of limitations. The questions raised have been considered and determined adversely to the appellants in appeal No. 1833. As the conditions of the two cases in respect of these questions are the same in both cases it is only necessary to refer to the opinion filed in No. 1833 for the conclusion that neither contention is tenable.

3. The fourth assignment of error is that the court erred: "In declining to permit appellants to show the prices paid for so much of their land as was taken for the extension of Eleventh street." The very brief bill of exceptions set out in the record does not recite any of the evidence heard by the jury. It recites merely that the appellants offered in evidence "so much of the verdict of the former jury as affects their lots, and shows the prices paid for lands taken, and the assessments as for benefits against lands not taken." This was objected to by the appellees unless the entire verdict is offered. Counsel for other claimants objected to reading any part of the former verdict. Thereupon the chairman of the jury declined to hear any part of the former verdict, on the ground that under the instructions of the court they were not allowed to consider any part of the former verdict except such as relates to grade damages. This ruling was certified to the court which sustained the ruling of the chairman, and the appellants excepted.

It is to be observed that the particular parts of the verdict which it was desired to read are not shown in the bill of exceptions; nor was any purpose stated for which it was offered. It is now contended that the verdict ascertaining the value of the land of appellants actually taken having been confirmed, was the best evidence by which the values of the remaining lands, adjacent thereto, at the time of the first condemnation proceedings, could be estimated. Assuming that the evidence was competent for that particular purpose, we can not, in the absence of any statement of what the general evidence heard by the jury was, determine whether the error was a material, or an immaterial one. The question in the case was the benefit received by reason of the street extension, and not the value of the lands actually taken, and for which payment had been made in accordance with the former award. It could only serve the purpose of proving a value at the time, by which the then value of the adjacent lands might be estimated; and for aught that appears, the same values may have been proved by appellant's witnesses. While the commissioners were concluded by the former finding of values, and compelled to make payments in accordance therewith, it does not follow that they were estopped thereby in arriving at the amount of the benefits accruing to the lands not taken. It appears also that the offer of the verdict of the former jury extended to their findings of benefits to the lands not taken as well as to the damages assessed for the lands that were taken. As the former and vacated assessment of benefits was clearly incompetent evidence, the appellants

should not have insisted upon both in the same offer. As part was incompetent evidence it was not error to exclude the whole when offered as such.

4. The fifth assignment of error relates to the giving of an instruction to the jury, at the request of the appellees, relating to the elements to be considered in assessing benefits, and to the refusal of certain instructions asked by the appellants. The following is the instruction excepted to:

"It is the duty of the jury to consider and assess the benefits which have resulted to the pieces or parcels of land on each side of Eleventh street northwest, as extended from Florida avenue to Lydecker avenue, and the benefits which have resulted to any and all other pieces or parcels of land from the said extension; and in determining the amounts to be so assessed against said pieces or parcels of land, the jury shall take into consideration the respective situations of the said pieces or parcels of land, and the benefits that they have severally received from the extension of said Eleventh street. By extension of the street the jury are to understand its establishment, laying out, and completion for all the ordinary uses of a public thoroughfare or highway."

This is the same instruction that was considered in No. 1833, as the cases of all property owners were heard together in the one proceeding. The refused instructions, numbered 1, 4, and 5, are identical with those numbered 1, 2, and 3 in No. 1833 as offered on behalf of appellants in that case and refused.

Strange to say, the additional instructions 1, 2, 3 and 4 shown by the record in 1833 to have been given by the court following the one that was excepted to are not shown in the record in the present appeal. As was held in No. 1833, however, we do not think that there was error in giving the instructions noted as excepted to without regard to the absence of the additional instructions which, as was held in that case also, covered every proposition contained in the refused instructions.

It does not appear in the record that there was any evidence whatever tending to show anything more than that the street had been opened and graded as contemplated at the time the original proceeding was begun. It does not appear, therefore, that there was any evidence tending to show any facts to which the refused instructions might have been applicable.

5. The second and third special instructions that were refused relate to the facts shown in the former verdict as to the assessed value of the lands therein. As we have held that there was no error in excluding that verdict from the jury it follows that instructions applicable thereto were properly refused.

For the reasons given the judgment confirming the verdict as to the appellants will be affirmed with costs.

Affirmed.

TUESDAY, *March 31st, A. D.* 1908.

No. 1815, January Term, 1908.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, and ROSE DOUGLASS MERRIAM, Appellants,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (acting), Commissioners of the District of Columbia.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD,
March 31, 1908.

MONDAY, *April 20th, A. D.* 1908.

No. 1815.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, and ROSE DOUGLASS MERRIAM, Appellants,
vs.
HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (acting), Commissioners of the District of Columbia.

On motion of Mr. H. Prescott Gatley, of counsel for the appellants, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars. And it is further ordered that the mandate in said cause be and the same is hereby stayed until further order.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell and Rose Douglass Merriam, Appellants, and Henry B. F. Macfarland, Henry L. West and Chester Harding (acting) Commissioners of the District of Columbia, a manifest error hath happened, to the great damage of the said Appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of April, in the year of our Lord one thousand nine hundred and eight.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———,

——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell, and Rose Douglass Merriam, as principals, and H. Rozier Dulany, as surety, are held and firmly bound unto Henry B. F. Macfarland, Henry L. West and Chester Harding (acting) Commissioners of the District of Columbia, in the full and just sum of Three hundred dollars ($300) to be paid to the said Henry B. F. Macfarland, Henry L. West, and Chester Harding (acting), Commissioners of the District of Columbia, their certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23rd day of April, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell, and Rose Douglass Merriam, Appellants, and Henry B. F. Macfarland, Henry L. West, and Chester Harding (acting), Commissioners of the District of Columbia, a judgment was rendered against the said Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell, and Rose Douglass Merriam, and the said Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell, and Rose Douglass Merriam, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry B. F. Macfarland, Henry L. West, and Chester Harding (acting), Commissioners of the District of Columbia, citing and admonishing them to be and appear at a Supreme Court of the

United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell, and Rose Douglass Merriam shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ROSA WALLACH, [SEAL.]
EMILY N. WALLACH, [SEAL.]
MARY ALEXANDER MITCHELL, [SEAL.]
ROSE DOUGLASS MERRIAM, [SEAL.]
All by H. ROZIER DULANY, *Attorney.* [SEAL.]
H. ROZIER DULANY.

Sealed and delivered in the presence of—
H. PRESCOTT GATLEY.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 1815. Rosa Wallach *et al.*, appellants, *vs.* Henry B. F. Macfarland *et al.* Bond for costs on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Apr. 25, 1908. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Henry B. F. Macfarland, Henry L. West and Chester Harding (acting), Commissioners of the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell and Rose Douglass Merriam are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 25th day of April, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service accepted April 25th, 1908.

JAS. FRANCIS SMITH,
Counsel for Def'd'ts in Error.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 54, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell, and Rose Douglass Merriam, Appellants, *vs.* Henry B. F. Macfarland, Henry L. West, and Chester Harding (acting), Commissioners of the District of Columbia, No. 1815, April Term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 25th day of April A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,152. District of Columbia Court of Appeals. Term No. 749. Rosa Wallach, Emily N. Wallach, Mary Alexander Mitchell, and Rose Douglass Merriam, plaintiffs in error, *vs.* Henry B. F. Macfarland, Henry L. West, and Chester Harding (acting), Commissioners of the District of Columbia. Filed April 29th, 1908. File No. 21,152.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 148.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, and ROSE DOUGLASS MERRIAM, Plaintiffs in Error,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, and CHESTER HARDING (Acting), Commissioners of the District of Columbia.

Stipulation and Addition to Record.

It is hereby stipulated and agreed by and between the respective parties to this appeal, by their counsel, that when the first jury was impanelled in this proceeding, they were instructed by the court, on the 7th day of December, A. D. 1899, as follows:

1st. That at least one half of the amount by them found due and awarded as damages, for and in respect of the land condemned under these proceedings, shall be assessed by them against the pieces or parcels of ground situate and lying along the building lines on each side of Eleventh Street as extended, and running back from said building lines to a depth of two hundred feet.

2nd. That in determining the amounts to be assessed against such particular pieces or parcels of ground, the Jury should take into consideration the respective situations of such parcels or pieces of ground, and the benefits they may severally receive from the extension and opening of said Eleventh Street.

3d. That when the whole estate, in any such piece or parcel of ground, shall be condemned the jury shall allow to the owner the fair market value of the ground so condemned.

4th. When the use of a part only of any such piece or parcel of ground, shall be condemned, the Jury, in determining the value of such part, shall not take into consideration the amount of any benefit they shall find will accrue to the remainder thereof from the opening of said Street; but they shall return their valuation of the part so condemned without deducting therefrom the amount of any such benefit.

But when the jury is determining what assessment shall be made against or upon the remainder of such piece or parcel which has not been condemned, the amount of such benefit shall be considered by the jury.

5th. That the ground belonging to the Garfield Hospital, lying and situate within the limits described in the first of the foregoing instructions, is not exempted by law from assessment for benefits

received from the opening of Eleventh Street—if the jury shall find such benefits.

A. B. HAGNER,
Associate Justice.

And on a subsequent day, towit the 10th day of July, 1900, they were further instructed as follows:

The jury are instructed that in estimating the damage done to the owner of land through which said Eleventh street will pass by reason of the extension and opening of same they are not confined to the value of the land covered or actually taken by such street, but should allow such owner a reasonable amount for the direct damage done to the remaining part of such piece or parcel of land.

Therefore, if they find, by reason of the extension and opening of said Eleventh street, it will be necessary to make deep cuts through such property, leaving the adjoining parts of the same land high above the contemplated grade of said street, which in their opinion will be of great damage and injury to such adjoining land or to any building thereon, unless sufficiently protected, then in estimating the damages to be awarded they should take into consideration the condition in which the remaining part of the land is left by reason of the extension and opening of said street, and also the cost of protecting such part of the land adjoining such cut and the buildings thereon, if any, and make allowance accordingly.

The above instruction is given.

A. B. HAGNER.

And it is also stipulated and agreed that in addition to the instructions given by the trial Judge to the jury, set out at the top of page 40 of the printed record, the said judge further instructed the jury as follows:

The jury are instructed that in ascertaining whether any benefit has accrued to any piece or parcel of land abutting upon or within the vicinity of Eleventh street extended, they shall not take into consideration any benefit that they find which has accrued to the land in question subsequent to the extension of said street. Therefore, in order to levy an assessment for benefits against any piece or parcel of land abutting upon said street or adjacent thereto, the jury must find that the benefits upon which assessment is based was brought about by the extension of said street, and not by any improvement made since it was extended, or by extension of car line in said street.

2. The jury is further instructed that they are not bound to levy any assessment whatever for benefits in this case, unless they find the property so assessed actually benefited by enhancement in value and that such benefit accrued immediately from the extension of the street in question.

3. And in establishing such benefits, in case they shall find any, they shall take into consideration — done to any piece or parcel abutting said street or adjacent thereto by reason of leaving the same above the established grade thereof; that is to say, if they should find

any piece or parcel of land benefited by laying out and opening of said street and shall also find that by reason of the grade of said street being fixed at a point much below the level of such ground, and that such ground by reason thereof is left far above the said street grade, so as to cause damage on account of grading the same, they shall take such grading into consideration, and if they find that the damage so sustained exceeds the benefits accruing, as formerly instructed, they shall not assess such piece or parcel of land at all; and in considering the benefits, and the damages caused by change of grade in extension of said street, the jury should take into consideration the amount allowed, if any, for damages by reason of such change of grade, by the former jury which assessed damages.

4. The jury are instructed that they are not at liberty to levy any assessment against any piece or parcel of land abutting upon or adjacent to said Eleventh street, unless they find such piece or parcel of land benefitted by actual enhancement in value immediately upon the opening and extension of said street and in considering whether or not any piece or parcel of land has enhanced in value, they have no right to consider any enhancement or increase in value, that is the result of any special improvement made upon the street after it was opened and established, *as previously stated,* neither have they the right to take into consideration any special improvement made upon any street crossing said Eleventh street.

It is further stipulated that this stipulation may be printed and added to the transcript of record.

H. PRESCOTT GATLEY,
SAMUEL MADDOX,
Attorneys for Plaintiffs in Error.
EDWARD H. THOMAS,
Corporation Counsel, Attorney for Defendants in Error.

[Endorsed:] No. 148. October Term, 1909. Wallach and others vs. Macfarland and others. Stipulation of counsel for addition to record. Law offices of Maddox and Gatley, 340 Indiana Avenue.

[Endorsed:] File No. 21,152. Supreme Court U. S. October term, 1909. Term No. 148. Rosa Wallach et al., Pl'ffs in Error, vs. H. B. F. Macfarland et al., Commissioners D. C. Stipulation of counsel and addition to record. Filed March 5, 1910.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 148.

ROSA WALLACH AND OTHERS, PLAINTIFFS IN ERROR,

vs.

HENRY B. F. MACFARLAND AND OTHERS, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

ARGUMENT AND BRIEF IN BEHALF OF THE PLAINTIFFS IN ERROR.

Statement of Facts.

This was a proceeding instituted in the Supreme Court of the District of Columbia, sitting as a district court, by petition of the Commissioners of the District, to condemn the lands necessary for the extension of Eleventh street, in accordance with an act of Congress, approved March 3, 1899. The act provides:

> "SEC. 3. That within ninety days after the passage of this act, the Commissioners of the District of Columbia are authorized and directed to institute, by a petition in the Supreme Court of the District of

Columbia, a proceeding to condemn the land necessary for the extension of Eleventh street, Northwest, on a straight extension of the lines thereof, as now established, in the city of Washington, with a width of ninety feet, from Florida avenue to Harvard street, and thence, with the same width, in a straight line, to Lydecker avenue. * * *

"That of the amount found due and awarded as damages for and in respect of the land condemned under this act for the extension of the said Eleventh street at least one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting that portion of the street to be opened, and extended to a depth of two hundred feet from the building lines of said Eleventh street as extended.

* * * * * * *

"SEC. 7. The sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of said lots and the benefits that they may severally receive from the opening of the street." * * *

The act further provides, in section 9, that the condemnation proceedings shall be conducted "under and according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of land in said District for public highways."

This chapter, commonly known as the "Highway Act," contains elaborate provisions for prosecuting condemnation proceedings all entirely out of court.

The sections particularly affecting the questions now presented are the following:

"SEC. 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious,

disinterested men, not related to any party interested, to then appear on the premises on the day specified, and assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof.

* * * * * * *

"SEC. 261. In making their decision, the jury shall take into consideration the benefit such road may be to each one by enhancing the value of his land, or otherwise, and shall give their verdict accordingly.

* * * * * * *

"SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury.

"SEC. 264. The verdict of the second jury, signed by each of the jurors, or a majority of them, shall be returned to the proper authorities at their next meeting and recorded as final and conclusive, and the road shall then be declared a public road, and opened as such."

[NOTE.—*For convenience of reference all of the sections of the Highway Act pertinent to this hearing are printed as an appendix to this brief.*]

The petition was filed on the 31st day of May, 1899, and on the 16th of September following an order was passed directing that notice of the proceedings be given interested parties by publication in the city papers. A jury of seven, as required by section 257 of the Highway Act, was subsequently empaneled and sworn, and filed their verdict on the 26th of February, 1900. Practically all of the landowners were dissatisfied with this verdict and filed exceptions thereto.

Pending a hearing on these exceptions, and on the 6th of June, 1900, an act of Congress was approved, entitled "An act for the extension of Columbia road east of Thirteenth street, and for other purposes." In this act the following provision relating to Eleventh street was incorporated:

> "The Commissioners of the District of Columbia are hereby authorized and directed to make application to the Supreme Court of the District of Columbia, holding a district court, for the final ratification and confirmation of the awards of the jury for and in respect to the land condemned for the extension of Eleventh street; and said awards, when so ratified, shall be paid as provided by the act of March third, eighteen hundred and ninety-nine, anything in said act to the contrary notwithstanding. And in the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall for any reason be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for a reassessment of such benefits under and in accordance with the provisions of this act."

Within a month after the passage of this act the Commissioners filed a motion in the cause asking for a confirmation of the verdict of the jury of seven filed on the 26th of February previous. This motion was confirmed in so far as the verdict awarded damages for lands taken, but so much of the verdict as levied assessments was vacated as being "illegal, null, and void."

From so much of this order as vacated assessments the Commissioners prosecuted an appeal to the Court of Appeals, and the order, so far as appealed from, was reversed and the cause remanded for further proceedings "in conformity with the opinion and decree of the court." (R., p. 12.)

From this judgment the Commissioners took an appeal to this court, but the appeal was dismissed for want of jurisdiction (187 U. S., 246).

The mandate of the Court of Appeals to the Supreme Court of the District went down on the 22d of July, 1893. On the 4th of March following an order was passed in the Supreme Court overruling the motion of the Commissioners "for confirmation of the assessments for benefits," on the ground that the property-owners were dissatisfied therewith, as appeared from their exceptions, and directing that if the Commissioners "desire to proceed further in the premises they shall, within a reasonable time, make application to this court for directing the United States marshal to summon a jury of twelve as provided by law." From this order the Commissioners prayed an appeal in open court. (R., p. 12.)

No steps were taken looking to a prosecution of the appeal, nor was any action taken by either the Commissioners or the property-owners to vacate the order so made directing that further proceedings be under the act of March 3, 1899. All parties interested in the proceeding were apparently satisfied with the order, but on the 17th day of June, 1904, some of the property-owners made a motion in the court to dismiss the suit on the ground, amongst others, of "failure of the petitioners (the Commissioners of the District) to proceed as required by the order of this court passed in the cause on March 4, 1904."

On the 17th day of June, 1904, an order was passed in the court below, by the same justice who had signed the order of March 4, above referred to, and without notice to counsel for property-owners, directing the Commissioners to "proceed in the matter of reassessment of benefits herein in accordance with the terms and provisions of the act of Congress approved June 6, 1900."

Thereafter, and on the 9th day of August, 1904, "an amended and supplemental petition" was filed in the cause by the Commissioners, which recited the proceedings had and taken under their previous petition, the order of March 4, 1904 (omitting, however, so much of this order as di-

rected the summoning of a jury of twelve), section 12 of the act of June 6, 1900, and the order of June 17, 1904, directing that further proceedings for the reassessment of benefits be taken in accordance with the terms and provisions of the act of June 6, 1900. The petitioners prayed for the summoning of a jury of seven. (R., pp. 14 and 15.)

On the 27th of October, 1904, an order of publication was passed. Nothing further was done till February 9, 1906, when an order was passed directing the marshal to summon a jury of "seven judicious, disinterested men * * * to reassess the benefits resulting from the extension of Eleventh street in accordance with the provisions of the act of Congress approved June 6, A. D. 1900." (R., pp. 16 and 17.)

To this amended petition plaintiffs pleaded (1) that proceedings for the reassessment of benefits, if any, to their land could be had only under the act of March 3, 1899; and (2) that the cause of action set up in the amended petition did not accrue within three years next before the filing thereof, to wit, on the 9th day of August, 1904. (R., p. 18.)

These pleas were overruled, and exceptions were noted and allowed by the justice presiding. (R., p. 39.)

After the jury was sworn, but before any testimony was taken, plaintiffs in error requested the court to give the jury certain instructions, but the court refused so to do; whereupon exceptions were noted and allowed. (R., pp. 40 and 41.)

At the hearing before the jury, and after evidence had been adduced tending to show the prices at which some of the lands had been sold subsequent to the establishment of the extension as a public thoroughfare, counsel for plaintiffs in error offered in evidence so much of the verdict of the former jury as affected their lots and showed the prices paid for their lands at the time of the taking; but the court declined to admit the proposed evidence, to which ruling exceptions were noted and allowed. (R., pp. 41-42.)

On the 16th of June, 1906, the verdict of the second jury was filed (R., p. 19), and numerous exceptions thereto noted on the part of the plaintiffs in error, mainly, because the assessments were unjust, unreasonable, excessive, and tended to confiscation of exceptants' property. (R., p. 23.)

On the 6th of May, 1907, an order was passed ratifying and confirming the verdict in all respects, "notwithstanding the objections and exceptions filed thereto, which are hereby overruled." (R., p. 37.)

From this order of confirmation, plaintiffs in error prayed and were allowed an appeal to the Court of Appeals, where the order was affirmed (R., p. 48), and thereupon a writ of error was ordered to issue, removing the cause to this court. (R., p. 51.)

ASSIGNMENT OF ERRORS.

The Court of Appeals erred:

1. In overruling the first plea of plaintiffs in error to the amended and supplemental petition to the effect that any assessment as for benefits could legally be made, if at all, only under and in accordance with the act of March 3, 1899.

2. In overruling the plea of the statute of limitations.

3. In declining to permit plaintiffs in error to show what was paid for so much of their land as was taken for the extension of Eleventh street at the time of the taking.

4. In instructing the jury as requested by the defendants in error that, for the purpose of assessing benefits, by the words "extension of the street," the jury is to understand the establishment, laying out, and completion for all the uses of a public thoroughfare or highway. (R., p. 40.)

5. In refusing to instruct the jury as requested by plaintiffs in error in their first, second, third, fourth, and fifth prayers. (R., pp. 40-41.)

ARGUMENT.

I.

After the filing of objections to the verdict of the first jury of seven by the plaintiffs in error and other land owners, and the judgment of the Court of Appeals and the Supreme Court of the District thereon, no further proceedings in the cause could properly have been taken by the District authorities, except as provided by the act of March 3, 1899, without subsequent adequate remedial legislation.

The question was directly raised by plaintiffs in error by their first plea to the so-called amended and supplemental petition of the Commissioners of the District, filed August 9, 1904 (which plea was overruled and exception duly noted), and was also raised on the appeal from the order confirming the verdict of the jury of seven.

The act of March 3, 1899, provided that the proceedings for land needed for the extension of Eleventh street should be *"under and according to the provisions of chapter* 11 *of the Revised Statutes of the United States relating to the District of Columbia."*

As above shown, section 257 of that act provides for the summoning of a jury of seven, and the awarding of damages; section 261 directs that in making their decision the jury shall take benefits into consideration; section 263 provides that "if the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises * * * and the marshal and jury shall proceed as before directed in regard to the first jury" (the award of

damages and consideration of benefits), and section 264 provides that the verdict of this second jury shall be "recorded as final and conclusive."

Under section 263 the verdict of the jury is merely tentative; it becomes an absolute nullity "if the proper authorities or any owners of the land are dissatisfied" with it. On the incoming of objections, the court is powerless to either confirm or reject the verdict, for the law is mandatory. When dissatisfaction with such verdict is indicated "the marshal *shall be ordered to summon a second jury of twelve,*" etc.

The matter of awards of damages and consideration of benefits, as found by a jury of seven, and whether reasonable or grossly excessive, is not the subject of review by the court. That is left, by the statute, to rest exclusively with the proper authorities and the landowners. If they are satisfied, the verdict stands; if either is dissatisfied, the marshal *shall* summon a second jury of twelve, and their verdict shall be recorded as *final and conclusive* (sec. 264).

The general principle applicable to municipalities seeking to levy and collect special taxes without pursuing statutory requirements is well stated as follows:

> "A municipality cannot enforce a charge against the property of one of its citizens for local improvements unless it is able to show that it has proceeded according to law by taking substantially all of the initial steps which the law prescribed as necessary to create the charge. If it fails to do something which the law intended to be done for the protection of the citizen, and to prevent the imposition of an undue burden upon his property, an omission of this sort ought not be looked upon as a mere informality or irregularity in the course of the proceedings, but should rather be regarded as a failure to do some necessary act which rendered the subsequent acts invalid and the charge unenforceable."
>
> Allen *vs.* City of Davenport, 132 Fed. R., 209.

Sections 263 and 264 of the Highway Act have several times received the consideration of the Court of Appeals, first in

Brown *vs.* Macfarland, 19 App. D. C., 525.

In that case the Court of Appeals held that when dissatisfaction was expressed with the verdict of a jury of seven proceeding under the Highway Act the submission of the matter of condemnation to a jury of twelve was an *"express mandate of the statute"* which the court could not disregard, and that it was the duty of the authorities to have the second jury summoned. In the opinion of the court, announced by the late Chief Justice Alvey, it is said (pp. 530-531):

> "The owners of lands proposed to be condemned are placed in the position of defendants or opponents of the proceeding of condemnation; and consequently all affirmative acts prescribed by the statute in perfecting the proceeding must be shown to have been complied with by the parties authorized to take and prosecute the proceeding. The whole proceeding is strictly statutory, and it must be affirmatively shown that all the provisions of the statutes that apply to the proceedings have been substantially complied with. *Otherwise the whole proceeding would be void and without effect.*"

This ruling was affirmed in

Todd *vs.* Macfarland, 20 App. D. C., 180,

where it was said that the filing of exceptions to the verdict of the jury of seven was sufficient evidence of dissatisfaction, and it thereupon *"at once and without more"* became necessary that a jury of twelve should be summoned.

The ruling was further considered and affirmed in

Macfarland *vs.* Saunders, 25 App. D. C., 438.

In this case the verdict of the jury of seven was confirmed, notwithstanding exceptions filed by dissatisfied landowners. The court say, at page 442:

> "Were all the provisions of such statutes substantially complied with? If not, under the authority of the case last referred to (Brown *vs.* Macfarland) we must hold that the decree or order of October 2, 1901, was not, merely voidable, but void, by reason of the fact that it is not controverted that a second jury of twelve was not summoned, *as required by the statute applicable to the proceeding.*"

The point under discussion was considered and passed upon in this case in a former appeal taken by the Commissioners and reported in 19 App. D. C., 531 (Macfarland *vs.* Byrnes). The appeal was taken from an order of the late Chief Justice Bingham, entered on the 3d day of July, 1900, on motion of the Commissioners, "filed under the act of Congress approved June 6, 1900, to confirm the verdict, award and assessment of the jury heretofore filed herein." By this order the court confirmed so much of the verdict as awarded damages for lands taken, but "decreed that the several assessments for benefits made, returned, and levied by the jury in the aforesaid award filed in this cause be, and they are hereby, declared illegal, null and void, and the same are hereby set aside and vacated" (R., p. 9).

The act of June 6, 1900, thus referred to, is entitled "An act for the extension of Columbia road east of Thirteenth street, and for other purposes." This act authorized and directed the Commissioners to make application to the Supreme Court of the District of Columbia for a final ratification and confirmation of the award of the jury in respect of the land condemned for the extension of Eleventh street, and further provided that "in the event that the assessments levied by the jury in relation to said Eleventh street shall, for any reason, be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for a reassessment of such benefits under and in accordance with the provisions of this act."

On the part of the appellees in the former appeal (not, however, the present plaintiffs in error) it was contended

that the order of Mr. Chief Justice Bingham in declaring the assessments for benefits to be illegal and void set in motion the instrumentalities of the act of June 6, 1900, and that no further proceedings could be had in the cause under the act of March 3, 1899, not even by way of appeal from the order itself. This contention was strenuously opposed by the corporation counsel in an elaborate brief.

With this contention thus strenuously urged on the part of the corporation counsel, the court agreed, in an opinion by Mr. Justice Morris, who says (page 537):

> "There is, however, a third consideration, which we cannot ignore in the disposition of this case. By the act of Congress of June 6, 1900, already mentioned, it was provided that if for any reason the assessments for benefits should be declared void, the Commissioners should make application to the court for reassessment. This evidently has no reference to the invalidity consequent upon judicial decision of the unconstitutionality of the act of Congress of March 3, 1899, for there could then of course be no lawful reassessment, since the foundation for the whole proceeding would fail. The holding of this court that the act of March 3, 1899, was unconstitutional did not therefore avail to set in motion the instrumentalities of the act of June 3, 1900, for reassessment. And when the Supreme Court of the United States held the act of 1899 to be a constitutional and valid exercise of legislative authority, all reason for reassessment under the act of 1900 vanished. Nevertheless, by the discordant tenor of judicial decision the appellees were induced to forego a right which should now be retored to them, that of summoning a second jury of assessment under chapter 11 of the Revised Statutes of the United States for the District of Columbia, under which these proceedings were instituted and have been prosecuted, if they now desire to avail themselves of that right."

Here is a clear and unmistakable enunciation of the Court of Appeals, having before it and under consideration at the time the act of June 6, 1900, and its effect upon the

act of March 3, 1899, that the proper course of proceeding for completing the condemnation of lands for the extension of Eleventh street was to summon a second jury, a jury of twelve, empaneled under chapter 11 of the Revised Statutes of the United States for the District of Columbia,—the "Highway Act." This is denominated a *right* of the landowners, enuring to all persons who filed objections to the verdict of the jury of seven. As we have seen, the plaintiffs in error were of that number.

To this judgment, against which they had contended, the landowners yielded a ready acquiescence, as in duty bound, if they took no appeal. But the District authorities were not satisfied with the judgment so pronounced in accordance with the contention of the corporation counsel, and took an appeal to this court, which appeal was dismissed for want of jurisdiction. The cause was thereupon remanded to the Court of Appeals, and the mandate of the latter court went down to the Supreme Court of the District in July, 1903, as follows:

> "You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the *opinion and decision* of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding." (R., p. 12.)

As has been pointed out, the "opinion and decision" of the Court of Appeals directed that any further proceedings to be taken in the cause should be under the Highway Act, which was in accordance with the contention of the District Commissioners. The Supreme Court of the District was "bound by the decree as the law of the case, and must carry it into execution according to the mandate."

Accordingly, the Supreme Court of the District, upon consideration of the mandate of the Court of Appeals, passed an order in the cause on the 4th day of March, 1904, directing the Commissioners, "within a reasonable time * * *

to summon a jury of twelve, as provided by law"; that is, by the act of March 3, 1899. Thus the Supreme Court undertook to proceed with the cause in strict accordance with the mandate, and it could do nothing else even if there was error in the judgment of the Court of Appeals, unless such error was first "corrected by such proceedings by a writ of error or appeal as may be allowed by the court which, by law, can review the decision."

In support of so plain a proposition, it is almost unnecessary to cite authorities, and only one or two will be referred to, where the rule applicable to such contingencies is clearly enunciated by this court.

In

Durant *vs.* Essex County, 101 U. S., 555, 556,

speaking on this subject, the court say, by Mr. Chief Justice Waite:

> "On a mandate from this court affirming a decree, the circuit court can only record our order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established. * * * The result of the appeal to us was an affirmance of what had been done below. After the appeal had been taken, the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down. We affirmed its decree and ordered execution. We might have ordered a modification so as to declare that the dismissal should be without prejudice. We did not do so. The circuit court had no power after that to do what we might have done and did not do."

The question was further and exhaustively considered in a case coming from the Supreme Court of the District sitting in general term, in

> *In re* Washington & Georgetown R. R. Co., 140 U. S., 91:

In that case a writ of mandamus was sued out, directed to the Supreme Court of the District of Columbia, on the

ground that it had entered up interest on a judgment *ex delicto* contrary to the mandate of this court. On page 95 it is said:

> "The command of the mandate of this court, 'that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding,' did not authorize the general term of the Supreme Court of the District to depart in any respect from the judgment of this court. Under these circumstances, the general term had no authority to make its order of June 9, 1890, in regard to interest on the judgment."

It was further said in the case (page 96):

> "The principle has been well established, in numerous cases, that, on a mandate from this court containing a specific direction to the inferior court to enter a specific judgment, the latter has no authority to do anything but to execute the mandate" (citing cases).

The course pursued by the Court of Appeals has placed the land-owners in the anomalous position of now appealing from a judgment that was entered against their contention in 1902, from which they took no appeal and in which they have ever since acquiesced. In the opinion of the Court of Appeals in the Columbia Heights Realty Company case (No. 157, October term, 1909; R., p. 119) criticism is made of the motion of some of the land-owners to dismiss the suit. But it is submitted, with all due deference, that the Court of Appeals "has not correctly apprised" the motion thus made. As has been pointed out, that court, more than two years before, had held that further proceedings in the courts could not be had under the act of June 6, 1900; and it cannot be supposed that counsel in the cause who had taken part in the argument of the case in the Court of Appeals would seriously request a judge of the Supreme Court to pass an

order directly in the teeth of the judgment of the appellate court.

On the contrary, the purpose of that motion was to have the suit dismissed for failure to proceed as required by the order of March 4, 1904. Unconscionable delays had theretofore marked the conduct of the case on the part of the District authorities. They had taken an appeal to this court from a judgment of the Court of Appeals, which was not a final judgment, and waited nearly a year after the mandate went down before taking any step whatever in the case. The threatened assessment of benefits was a cloud on the title of the land-owners and a practical restraint on alienation. So the order of March 4, 1904, required that if the Commissioners desired to proceed further "in the premises" they must do so within a reasonable time. The land-owners waited more than three months. Nothing was done meanwhile by the Commissioners, and the motion to dismiss was made because of the "failure of the petitioners to proceed as required by the order of this court passed in the case March 4, 1904." And in this connection it will be noticed that after the filing of the amended and supplemental petition in August, 1904, no further step was taken until February, 1906. Can it be that the authorities wanted a share of the benefits likely to accrue to the abutting land-owners from the installation of an electric trolley line along Eleventh street?

The judgment of the Court of Appeals, that further proceedings in the cause must be had in accordance with the act of March 3, 1899, was promulgated during the April term, 1902. An appeal was taken, but dismissed on the 1st of December, 1902. *It has therefore become a final judgment, and, right or wrong, is now the law of the case.* The Court of Appeals is without power to reverse, annul, or modify that judgment. This has been conclusively settled in this court in numerous cases.

In

Sibbald *vs.* United States, 12 Peters, 492,

the court, speaking by Mr. Justice Baldwin, said:

> "No principle is better settled, or of more universal application than that no court can reverse or annul its own final decrees or judgments for errors of law or fact after the term in which they have been rendered * * * unless for clerical mistakes, or to reinstate a cause dismissed by mistake; from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. * * *
>
> "When the Supreme Court have executed their powers in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the court below to award it. Whatever was before the court and was disposed of is considered as finally settled. *The inferior court is bound by the decree as the law of the case* and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. * * * *On a subsequent appeal nothing is brought up but the proceeding subsequent to the mandate.*"

In

Bronson *vs.* Schulten, 104 U. S., 410, 415,

Mr. Justice Miller, speaking for the court, said:

> "In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the State courts they are unimportant. It is a general rule of the law that all the judgments, de-

> crees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court. But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceedings by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court."

Cited with approval in

Phillips *vs.* Negley, 117 U. S., 665, 672,

where this court decided that the Supreme Court of the District of Columbia could not set aside, even on a plain showing of fraud, accident, and mistake, its final judgments after the close of the term at which they were entered.

In

Supervisors *vs.* Kennicott, 94 U. S., 498,

the court, speaking by Mr. Chief Justice Waite, said:

> "When this case was here on a former appeal, we decided that the mortgage in controversy was valid in favor of the *bona fide* holders of the bonds it was given to secure, and that the complainants were entitled to a decree for the amount of the bonds held by them (Kennicott *vs.* Supervisors, 16 Wall., 468, 471). These questions are, therefore, no longer open; for it is settled in this court that whatever has

been decided here upon one appeal *cannot be re-examined in a subsequent appeal in the same case.*"
See also
Corning *et al. vs.* The Tracy, &c., Factory,
15 How., 451, 466.

As was said in the case of Sibbald *vs.* United States, *supra*, "whatever was before the court and was disposed of is considered as finally settled."

The main question before the Court of Appeals in Macfarland against Byrnes (the first appeal in this case) was whether the further proceedings should be under the act of March 3, 1899, or the act of June 6, 1900. The property-owners contended for the act of June 6, 1900, because it provided that assessments as for benefits could be made only to the extent of benefits. The Commissioners contended for the act of March 3, 1899, and the verdict of the jury of seven rendered return thereunder, because the assessments were an apportionment of one-half of the amount paid for the land levied upon other lands within a very limited radius. To this verdict many objections were filed, because the assessments had been levied without regard to benefits, greatly exceeded such benefits and tended to confiscation.

The question was decided in favor of the contention of the Commissioners that further proceedings should be in accordance with the provisions of the act of March 3, 1899. As was said by this court in

Corning *et al. vs.* Troy, &c., Factory, *supra*,

"whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal in the same case."

The order of June 17, 1900, was in no sense a final order, and therefore not appealable. So there was nothing for the plaintiffs in error to do but wait until proceedings were begun under that order and then plead in bar that further proceedings could be had only under the act of March 3, 1899, as directed by the mandate of the Court of Appeals.

That plea was overruled, and an appeal was taken from the order and is now here presented.

Commenting on this feature of the case the Court of Appeals, in its opinion in the Columbia Heights Realty Company case (R., 157, page 124), says:

> "Having suggested the procedure under the later act (the act of June 6, 1900), and carried on the litigation, without objection, in accordance therewith, the appellant is estopped to object to the verdict on the ground alleged. Having made his election, he is bound by it."

As has been shown, Byrnes, appellant in the former appeal, had unsuccessfully contended in the Court of Appeals that further proceedings should be under the act of June 6, 1900. Can it be that after this adverse decision he was at liberty to select a course of procedure different from that prescribed by the Court of Appeals? If so, why go through with the empty form of asking the Court of Appeals by a peremptory order to direct the authorities to proceed under that act? Certainly this states a curious anomaly in legal proceedings—that it was still in the power of Byrnes and other land-owners to select a course of procedure in the lower court after the Court of Appeals had solemnly adjudged that such a course must not be pursued—that something quite different must be done.

Again, it will be noted that the Court of Appeals says the land-owners "carried on the litigation" under the order of June 17 "without objection," and manifestly in reaching that conclusion the court overlooked the plea in bar of the plaintiffs in error. The amended and supplemental petition filed pursuant to the order of June 17 was filed two months later, on the 9th of August (R., p. 14), but it was not until February 9, 1906, that an order was passed directing the marshal to summon the jury (R., p. 17). Thereafter, and before the taking of evidence was begun, the plea in bar of the plaintiffs in error was filed (R., p.

18), that further proceedings could be had only under and in accordance with the act of March 3, 1899. Without passing on the validity of this plea, the court directed the jury to proceed with the work of assessment. A month after the verdict of the jury was filed the plea was overruled. But having by their plea taken exception to the proceeding to no purpose, nothing was left for the plaintiffs in error except to make the best showing they could before the jury and reserve the right to contest the regularity of the proceedings at a later stage of the cause or on appeal. This they have done, and we submit that the Court of Appeals must have overlooked the plea in bar of the plaintiffs in error in announcing its conclusion that they had "carried on the litigation without objection."

But without taking into consideration the positive mandate of the Court of Appeals that further proceedings in the case should be conducted in accordance with the provisions of the act of March 3, 1899, an analysis of the two acts shows that no such condition had arisen as called for proceedings under the act of June 6, 1900.

The act of March 3, 1899, in so far as it related to the proposed extension of Eleventh street, required "that of the amount found due and awarded as damages for and in respect of the land condemned under this act * * * at least one-half thereof shall be assessed in said proceedings * * * against those pieces or parcels of ground abutting that portion of the street to be opened and extended to a depth of 200 feet from the building lines of Eleventh street."

This law does not call for an assessment of benefits or limit the assesments to benefits actually conferred, but directs an arbitrary apportionment of at least one-half of the damages awarded. True, the law further provides, in section 7, that in making the assessment the jury "shall take into consideration the situation of the lots and the benefits that may be severally received from the opening of said street." But whether they found benefits or not, the jury

was bound to assess at least one-half of the cost of the land needed for the extension on those "pieces or parcels of ground" within the doomed area. The act did not direct an assessment of benefits, and none could properly have been made under it.

Appreciating this difficulty, the corporation counsel, in the original petition of the Commissioners, filed as required by the act, did not ask for an assessment of the benefits which each piece or parcel of ground might derive from the contemplated improvements, for the law was silent on the subject; he did not ask that one-half of the amount awarded as damages should be arbitrarily assessed against lands in a designated district, for that might have called attention to the inherent weakness of the law from a constitutional standpoint. So he asked that a jury of seven might be summoned to award damages for lands taken, and then in vague and general terms that such "other and further orders may be made and proceedings had as are contemplated by" the act of March 3, 1899, and chapter 11 of the R. S. U. S., D. C.

A jury was summoned in response to the prayer of the petition, and the first instructions given by Mr. Justice Hagner (Addition to Record) were practically in the language of the act—that the jury should in any event apportion at least one-half of the cost of the lands, and they should take into consideration benefits; not, however, for the purpose of reducing the apportionment, if perchance it was in excess of the benefits actually conferred, for that at least one-half of the cost must be assessed was a positive mandate of the statute. In their verdict the jury assessed the sum of $134,560, being one-half of the cost of the land, against the lots within the prescribed area "which we find will be benefited by the extension of Eleventh street" (R., No. 157, p. 2).

By no possible construction of language can this be considered an assessment of benefits. It was simply and merely an arbitrary apportionment of a gross sum—a very different thing from the ascertainment and assessment of benefits.

The verdict of the first jury was filed February 6, 1900, and numerous exceptions were noted by the land-owners. In their behalf it was contended that these exceptions, *proprio vigore,* nullified the verdict. There was urgent demand from some quarter that Eleventh street should be opened without delay. The act for the extension of Columbia road was then pending and a dozen lines were added at the end of the act to provide for the Eleventh street emergency. The District Commissioners were authorized to apply to the Supreme Court of the District for a confirmation of the award of damages, while section 11 of the act provided that no appeal by a person interested should prevent the Commissioners from taking possession of the land condemned.

The concluding five of the dozen lines are as follows:

> "And in the event that the *assessments for benefits* levied by the jury in relation to said Eleventh street shall for any reason be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for a *reassessment of such benefits* under and in accordance with the provisions of this act."

Under no circumstances could further proceedings be had under the act of June 6, 1900, until the "assessments for benefits" levied by the former jury "shall for any reason be declared void." This can only mean by some action by the court. But when the supplemental petition was filed on the 9th of August, 1904, there was no valid or operative order of court in the cause declaring these assessments void. True, the order of Mr. Chief Justice Bingham of July 30, 1900, had declared these assessments "illegal, null, and void." (R., p. 11.) But this order was predicated of the judgment of the Court of Appeals in the case of Davidson *vs.* Wight, then recently promulgated (April 25, 1900), declaring that the act of March 3, 1899, was unconstitutional, and not a "valid exercise of legislative authority." (16 App. D. C., 371.) From this order the Commissioners took an appeal to the Court of

Appeals. But before the appeal was reached, this court held the act of March 3, 1899, was constitutional, reversed the judgment of the Court of Appeals in the case of Davidson *vs.* Wight, and remanded the cause for further proceedings.

The mandate went down from this court in December, 1901. In March following, the first appeal in this case was submitted in the Court of Appeals and decided April first. Under Wight and Davidson, as decided by this court, the Court of Appeals held that the order of the Supreme Court of the District of July 3, 1900, declaring the assessments null and void must be reversed. And it was so ordered. (19 App. D. C., 38.)

When the mandate went down a somewhat unusual thing occurred in that "upon consideration" of it, the justice then holding the District Court "set aside and vacated" an order passed in the same court nearly four years before. So the order of July 3, 1900, was doubly reversed, and there was nothing in the cause to call into operation the act of June 6, 1900. Clearly it will not be contended that this might have been accomplished by an erroneous order subsequently reversed!

And it will be noticed that the case was "further heard on motion of the petitioners for confirmation of the assessment of benefits." (R., p. 12.) This the court declined to do. Instead, after "due consideration of the exceptions of the respondents," the court held that it had no power to either confirm or declare void the assessments, because under section 263 of the Highway Act objections to the verdict of a jury of seven, whether of the authorities or the property-holders, automatically made it necessary that a jury of twelve be summoned. This was in accordance with the decision of the Court of Appeals in Todd *vs.* Macfarland, *supra*, that—

> "The filing of the exceptions to the verdict and objecting to the ratification thereof as rendered, was sufficient evidence of dissatisfaction of the exceptants with the verdict, and it thereupon, at once and without more, became necessary that a second jury should be ordered, as to the property of the exceptants."

The almost inextricable confusion in the decisions of the Court of Appeals in these street extension cases under the act of March 3, 1899, arises from a manifest failure to notice that the Highway Act does not call for the interposition of a court at any stage of the proceedings. The machinery of that act was put in operation by the mere summoning of a jury of seven. The court was not called upon even to administer an oath to the jurors. This was done by the marshal. The jury was required to "make out a written verdict" and "submit it to the proper authorities" (section 262). If the proper authorities or any owners of the land were dissatisfied with the verdict, "the marshal shall be ordered to summon a second jury" (section 263), and the verdict of the second jury shall be "recorded as final and conclusive" (section 264). There was no point in the proceedings from the time when the first jury was summoned until the verdict of the second jury—the "final and conclusive" verdict—was recorded, where any action by the court was called for or authorized. The order of the District Court of March 4, 1904, recognized these provisions of the Highway Act and directed that a jury of twelve be summoned "within a reasonable time." But this cannot be considered the legal equivalent of declaring "void" the assessments made by the first jury, for under the law it was not in the province of the court to pass upon the exceptions taken either by the authorities or the property-owners, and without some such declaration the act of June 6, 1900, by its very terms, could not be invoked.

As has been pointed out, up to the time of the passage of this act there had been no assessment of benefits, but only the arbitrary apportionment of one-half the damages awarded for lands taken for the extension. The act of March 3, 1899, made no provision for an assessment of benefits. The original petition of the Commissioners had not asked for such an assessment, and the instructions of the court to the jury had not directed such an assessment. When the jury came to make up their verdict they apportioned the sum of $134,560, one-half of the damages awarded, against

the lands within the designated area in accordance with the instruction of the court (R., No. 157, p. 4.) It was not within the province of the jury to ascertain benefits or to make "assessments for benefits." All that they could properly do was to apportion damages.

Wherefore, when the act of June 6, 1900, was passed there had been, in fact, no assessments for benefits and, therefore, none which for any reason could be declared void. This was the only contingency that could "set in motion the instrumentalities of the act of June 6, 1900, for reassessment" (*Macfarland vs. Byrnes*).

Again, the act of June 6, 1900, in its reference to Eleventh street authorizes and directs the Commissioners to make application to the court for a "reassessment of such benefits" under and in accordance with the provisions of that act. To what assessments can the word "such," as so used, be referred? The assessments made by the first jury were limited to lands within 200 feet of Eleventh street. It was against such lands only that the Commissioners asked assessments in their original petition. When the amended and supplemental petition was filed they asked that assessments should be levied "on any and all pieces or parcels of land which had been benefited by the extension of Eleventh street" (R., p. 15). But thus to go outside of and beyond the original area of assessments is clearly in excess of any power or right conferred by the act of June 6, 1900, for that act in terms authorized only the reassessment of benefits, and not an assessment of lands against which there had been no previous assessment.

The act of June 6, 1900, provides a scheme of assessment entirely different from that required by the act of March 3, 1899. As has been shown, the latter act called for assessments without regard to benefits actually conferred. So of the other acts passed early in that year. The constitutionality of these acts was being assailed in several cases, and when the act for the extension of Columbia road was

passed there appeared for the first time a provision that assessments as for benefits should be limited to benefits actually conferred. But the provisions of this act are so narrow in their scope as to make them impracticable for any other street extension without more specific directions than are given by that act. It is not to be wondered at that its attempted application in this case has led to the almost inextricable mix-up presented by the record.

To sustain the judgment below the court must find—

(*a*) That the arbitrary apportionment of one-half the cost of the land needed for the extension of Eleventh street is the legal equivalent of an assessment of benefits.

(*b*) That a reassessment authorizes an extension of the original area of assessment.

(*c*) That the Court of Appeals cannot only disregard its own judgment, but act counter thereto eight years after the term has passed when the judgments were pronounced. (Notwithstanding Phillips *vs.* Negley, *supra.*)

(*d*) That the Supreme Court of the District of Columbia can ignore the judgment of the Court of Appeals and proceed in direct violation of its mandates.

Wherefore, we submit that the plea of plaintiffs in error in bar of proceedings under the act of June 6, 1900 (R., p. 19), should have been sustained and the Commissioners of the District of Columbia required to proceed as directed by the mandate of the Court of Appeals. It follows that the verdict of the second jury of seven must be set aside, vacated, and for nothing held.

[NOTE.—*The second assignment of error—the overruling of the plea of the statute of limitations—is so fully discussed in the brief of counsel for plaintiffs in error in case No. 157 that we deem a further discussion of that assignment unnecessary.*]

II.

The jury should have been permitted to consider, in connection with other evidence offered, the prices paid by the District for lands needed and condemned for the extension of Eleventh street as tending to show the fair market value of the lands at that time.

As appears by the record (R., pp. 4, 5), the first jury of seven spent three months investigating the market value of the lands in that section of the District just before the street was opened. Necessarily this involved an inquiry into then recent sales on intersecting streets at or near the proposed extension, and these sales constituted the standard of valuation, for the jury were instructed not to consider any enhancement in value which might result to these lands by the opening of the new street. To this verdict exceptions were filed by land-owners, aimed entirely at the alleged extravagance of the assessments. The District authorities, on the other hand, were satisfied with the award of damages and filed no exceptions to the verdict. So it appears that the land-owners and the public authorities were all agreed that the valuation of the lands needed and subsequently taken for the extension, thus made by the jury, was fair and reasonable.

But on the incoming of objections by the land-owners the verdict became a nullity (Brown *vs.* Macfarland, *supra*). Without further proceedings the lands could not have been condemned, nor could the District have been compelled to pay the price fixed by the jury at the suit of the land-owners. The quasi-compulsory negotiations between them were temporarily at an end, but the District authorities had still the right to ask for a new jury, a jury of twelve, and another valuation of the lands. They did not avail themselves of this option, possibly because the public demand for the new

street was urgent and possibly because they were apprehensive lest a second jury would rate the lands at a higher figure.

Instead, as it is fair to assume, the Commissioners were instrumental in having the dozen lines added to the act of June 6, 1900, giving them authority to pay the prices ascertained and fixed by the jury, which the landowners were willing to accept and did subsequently accept. So eager were the authorities to get the lands at these prices that they were willing to postpone all question of benefits.

This point was raised in two ways by the court below:

1. In the second and third instructions asked by the plaintiff in error (R., p. 40), as follows:

> (*a*) "In estimating the benefits, if any, accruing to lands abutting upon and near Eleventh street as extended, by reason of such extensions, the jury should take as a standard of value the price paid per square foot for the lands condemned for the extension of said street, and for that purpose a certified copy of the award of damages for land so taken, as set forth in the verdict of the jury filed herein on the 20th of February, 1900, may be offered in evidence."
>
> (*b*) "In estimating the benefits, if any, accruing to lands abutting upon and near to Eleventh street as extended, by reason of such extension, the jury may consider in connection with such other evidence as may be offered by the several parties in interest, the prices paid per square foot for the lands condemned for the extension of said street, and for that purpose a certified copy of the award of damages for lands so taken, as set forth in the verdict of the jury filed herein on the 20th day of February, 1900, may be offered in evidence."

2. In the actual tender of proof before the jury (R., p. 47).

Here, then, should have been the starting point for ascertaining the benefits resulting from the extension. On the one

hand, land-owners would be estopped from asserting that they parted with their lands at less than their market value for the purpose of minimizing benefits, and, on the other hand, the authorities would not be heard to say, for the purpose of increasing benefits, that more had been paid for the lands than they were actually worth at the time. In other words, as between plaintiff in error and the District authorities, a basis for ascertaining benefits was practically agreed upon from which neither party could recede.

To illustrate: At the inception of the proceedings, plaintiffs in error owned all of lot 4, in block 14, of Todd and Brown's subdivision. About one-third of the lot was needed for the street extension and purchased by the District for $1,282 or at the rate of 50 cents per square foot (R., p. 5). The rest of the lot was sold to other parties, while the second jury were conducting their inquiries, at a slight advance over what the District had paid. This difference marked the only possible benefit that resulted, or could result, to plaintiffs in error by reason of the extension, for it cannot be presumed that after waiting six years for a purchaser they did not sell at the highest obtainable price; and if the jury, in estimating the benefit to the lot, exceeded this difference, their verdict is so far forth unfair and is the legal equivalent of taking private property without rendering just compensation.

The word "benefit," as used in the street-extension acts, means, and can only mean, value added by the public improvement; but increment can never be determined until initial value is ascertained. Initial value therefore becomes and is the crucial fact to be proven. Of this the proffered proofs were not only the best but the only available evidence. But the court rejected this evidence and left the jury to flounder in the domain of generality and speculation. They were forced to rely upon the opinions of real-estate agents touching the value of lands six years before, as to which the contesting parties had already agreed, and which, therefore, was not open to question.

The prices fixed by the first jury might well have been taken as the "standard" of value by the second jury, as requested in the second instruction, for that had been matter of agreement between the public authorities and the landowners at the time of the taking, with the approval of the court. It thus constituted a solemn, judicial ascertainment of value as a starting point for the consideration of the second jury.

But whether taken as a standard or not, the evidence should have been allowed to go to the second jury for consideration "in connection with such other evidence as may be offered by the several parties in interest" as requested in the third instruction. The first jury, composed of "seven judicious, disinterested men," had given careful consideration to the duties assigned to them by the court. They had "been upon the premises" and investigated conditions existing at the time of the condemnation, and their verdict was predicated of this "view" when there was no north and south street, as further enlightened by the testimony of many expert witnesses familiar with the prices of land in that section at the time.

When the second jury began its consideration of the same question six years later, an entirely new landscape was presented. They found that many improvements had been made on the new street by private enterprise, and that a double-track electric street-car line was in full operation; and because of the street-car facilities they found that many residences and business buildings had been erected on the cross-streets in the vicinity, also by private enterprise. Such improvements necessarily had added to the value of the lands when the second jury was considering the matter of benefits, and it was comparatively easy for the jury to ascertain this value from the testimony of witnesses familiar with prices realized at then recent sales of which there was a great number. To determine "benefit," therefore, or increase in value, it was only necessary for the second jury

to have a starting point—to know what the value of these same lands was six years before at the time of the taking, and then a simple process in subtraction. Although such starting point had been agreed upon between the authorities and the land-owners, evidence of it was not allowed to go to the second jury, and herein we submit serious error was committed, greatly to the prejudice of the plaintiffs in error.

Even had the evidence been admitted, the second jury would still have had a difficult task before them in determining what proportionate part of the enhanced value of the land, where enhancement was found, was the result of—

(*a*) Sewer, sidewalks, curbs and water mains, for which the land-owners had paid;

(*b*) The installation of a trolley line on the new street;

(*c*) The erection of houses thereon by private enterprise; and

(*d*) The rapid growth of the city and the resultant increase in value of contiguous suburban lands.

After hopeless floundering in the maze of opinions and theories, the jury finally found that all of the increment actually accrued, and more besides, were the direct result—the "benefit"—of the mere condemnation of the land for the extended street. Had they been advised where properly to start their investigation, such gross injustice to the unfortunate land-owners as is reflected in this verdict would not have been perpetrated.

III.

The court erred in granting the instruction given at the request of the District Commissioners.

This instruction is as follows (R., p. 40):

> "It is the duty of the jury to consider and assess the benefits which have resulted to the pieces or parcels of land on each side of Eleventh street, northwest, as extended from Florida avenue to Lydecker avenue, and the benefits which have resulted to any and all other pieces or parcels of land from said extension; and in determining the amounts to be so assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of the said pieces or parcels of land and the benefits that they have severally received from the extension of said Eleventh street. By the extension of the street the jury are to understand its establishment, laying out and completion for all the ordinary uses of a public thoroughfare or highway."

The vice of this instruction is in the concluding clause, where the court told the jury that *"by the extension of the street the jury are to understand its establishment, laying out and completion for all the ordinary uses of a public thoroughfare or highway."* This necessarily, of course, includes the grading and paving of the street.

But no such completion was authorized or directed by the act of March 3, 1899. That act merely authorized the Commissioners to institute by petition in the Supreme Court of the District of Columbia a proceeding to "condemn the land necessary for the extension of Eleventh street" (sec. 3), and to "make payment of the sum or sums of money adjudged to be due for lands taken under the provisions of this act" (sec. 10).

The language of the act under which the assessments were actually made, the act of June 6, 1900, is identical—

to "condemn the land necessary for the extension of Columbia road east of Thirteenth street."

As far as appears, the sole purpose of both acts was to acquire by condemnation the lands necessary for the proposed two streets. There is not a word in either act which would authorize the Commissioners to grade or pave the streets when the land asked for was condemned or to otherwise complete Eleventh street "for all the ordinary uses of a public thoroughfare or highway." Although the public authorities were under no obligation to abutting land-owners to grade and pave the street, the jury were instructed that they might levy benefits against these same land-owners on the theory that the street was completed "for all the ordinary uses of a public thoroughfare or highway."

The matter of benefit assessments for local improvements when land is taken under condemnation proceedings was considered by this court in

Bauman *vs.* Ross, 167 U. S., 549.

In this case the court had under consideration the act of March 2, 1893, to provide for a permanent system of highways in the District of Columbia. In an exhaustive opinion the late Justice Gray analyzes the many sections of the act and reviews the several acts of Congress providing for the laying out of streets and highways in the District of Columbia.

Commenting on sections 6 and 7 of the act, he says (585-6):

> "Although the word 'opening' does not occur in section 6, while it is used in section 7, yet the authority of the court, as defined in either section, is only 'to condemn a permanent right of way for the public' over the lands in question, and does not include the actual laying out and construction of the new highways. Condemnation, and nothing more, is likewise mentioned in the corresponding provisions of section 9."

But, as pointed out in the opinion, other sections of the law provided for the establishment and opening of the street, and assessments as for benefits to result from a completed street could therefore properly be made under the act.

But the act of March 3, 1899, is a condemnation act pure and simple, and under its provisions the Commissioners could only acquire title to the land for purposes of a street or highway to be established or completed, if at all, only when further legislation might be enacted by Congress. Wherefore, the jury should have been instructed to limit assessments to such benefits as were likely to accrue from the bare acquisition of the land by the District authorities for a public street which might in the future be established and completed "for all the ordinary uses of a public thoroughfare or highway."

IV.

The court erred in refusing to grant instructions Nos. 1, 4 and 5 requested by the plaintiff in error.

These instructions are as follows:

> "(1) The jury are instructed that in ascertaining whether or not any benefit has accrued to any piece or parcel of land abutting upon Eleventh street, extended, or in the vicinity thereof, they shall not take into consideration any benefit which they may find has accrued to such land subsequent to the laying out and establishing of said street. That is to say, that in levying assessments for benefits, if any the jury shall find, they shall not take into consideration the grading or paving of the street, nor any improvements or street-car facilities thereon subsequent to the laying out of the street. In other words, the jury must find that the benefit upon which an assessment is based was the direct result of laying out and establishing the street, and not the result of improvements

since made either in or upon the street itself, or abutting near-by lands."

"(4) Such special improvements as water mains, sewers, curbs, gutters and sidewalks are usually assessed in other proceedings, and of course, any enhancement in value arising from that character of improvements and the macadamizing of the street in question, or any street crossing same, should not be taken into consideration as a basis of benefit in this case."

"(5) The jury are instructed that in estimating what benefits, if any, have accrued to any piece or parcel of land abutting upon or adjacent to said Eleventh street, they are not at liberty to take into consideration any enhancement in value or benefit that has been given or accrued to such land by the grading of said street nor macadamizing the roadway of same; nor have they the right to base their assessments for benefit upon any enhancement in value, if they find any, brought about by the laying of sidewalks, sewers, water mains, gutters, or curbs that have been placed in or upon said street; their sole right to levy an assessment against any piece or parcel of such land must be founded upon such benefits, if any, as have accrued to the land from the extension of the street only. And what is meant by extension is the condemnation of the land for public uses and locating said street by demarcation and boundaries and placing the same upon the maps and plans of the District of Columbia as a public highway."

[NOTE.—*The error in refusing to grant instructions Nos. 2 and 3 was pointed out in connection with the offer to prove prices at which the District purchased lands needed for the extension of Eleventh street under the second head of this brief.*]

The object of these prayers was to restrict, if possible, the instruction of the court which told the jury that the "extension" of a street contemplated by the act of March 3, 1899, meant its completion for all practical purposes.

The vice of this instruction has already been pointed out.

The first and fourth prayers were intended to eliminate from the assessments that were directed to be made such benefits as resulted from—

(1) Grading and paving.

(2) Street-car facilities and improvements made subsequent to the extension.

(3) Improvements on abutting near-by lands.

(4) Installation of water mains, sewers, and sidewalks.

(5) The macadamizing of streets crossing the proposed new street.

In the fifth prayer an effort was made to have the jury limit their assessment to such benefits as resulted from the fact of condemning the land necessary for the proposed new highway, locating the same by demarcation and boundaries, and placing it upon the maps of the city as a public highway.

When they had gone thus far, the power of the District authorities was fully exercised under then existing laws. It was a monstrous proposition to assess these land-owners for benefits to result from improvements that might never be made and sell their lands if the assessments were not paid.

In its opinion (R., p. 48) the Court of Appeals said:

> "Strange to say, the additional instructions 1, 2, 3, and 4 shown by the record in 1833 (No. 157 in this court) to have been given by the court following the one that was excepted to are not shown in the record in the present appeal."

In this connection it will be noticed that the bill of exceptions was *"settled by consent"* (R., p. 42) on the 7th day of June, 1907. It may have been that on that date these four instructions, though perhaps signed by the justice presiding at the trial, had not been actually filed with the clerk, and were still in the custody of counsel for the petitioner; or it may be that counsel for the petitioner did not

care to have them inserted in the bill of exceptions presented by the plaintiffs in error, and changed his mind as to the need of having them in the record two months later, when the bill of exceptions was presented by the Columbia Heights Realty Company. But to save the necessity of going outside the record for a possible explanation of the omission, and to avoid controversy, counsel have consented that these four instructions may be taken as having been granted by the trial justice and considered a part of the record in this case.

These instructions are as follows:

> "(1) The jury are instructed that in ascertaining whether any benefit has accured to any piece or parcel of land abutting upon or within the vicinity of Eleventh street extended, they shall not take into consideration any benefit that they find which has accrued to the land in question subsequent to the extension of said street. Therefore, in order to levy an assessment for benefits against any piece or parcel of land abutting upon said street or adjacent thereto, the jury must find that the benefits upon which such assessment is based were brought about by the extension of said street, and not by any improvement made since it was extended, or by extension of car line in said street.
>
> "(2) The jury is further instructed that they are not bound to levy any assessment whatever for benefits in this case, unless they find the property so assessed actually benefited by enhancement in value and that such benefit accrued immediately from the extension of the street in question.
>
> "(3) And in establishing such benefits, in case they shall find any, they shall take into consideration the damage done to any piece or parcel of land abutting said street or adjacent thereto by reason of leaving the same above the established grade thereof; that is to say, if they should find any piece or parcel of land benefited by laying out and opening of said street, and shall also find that by reason of the grade of said street being fixed at a point much below the level of such ground, and that such ground

by reason thereof is left far above the said street grade, so as to cause damage on account of grading same, they shall take such grading into consideration, and if they find that the damage so sustained exceeds the benefits accruing, as formerly instructed, they shall not assess such piece or parcel of land at all; and in considering the benefits, and the damages caused by change of grade in extension of said street, the jury should take into (account?) the amount allowed, if any, for damages by reason of such change of grade, by the former jury which assessed damages.

"(4) The jury are instructed that they are not at liberty to levy any assessment against any piece or parcel of land abutting upon or adjacent to said Eleventh street, unless they find such piece or parcel of land benefited by actual enhancement in value immediately upon the opening and extension of said street and in considering whether or not any piece or parcel of land has enhanced in value, they have no right to consider any enhancement or increase in value that is the result of any special improvement made upon the street after it was opened and established, as previously stated, neither have they the right to take into consideration any special improvement made upon any street crossing said Eleventh street."

(*Instruction numbered 3 relates entirely to damages caused by changes of grade, which question in no way concerns lands of the plaintiffs in error.*)

It will be noticed that these instructions direct the jury that in estimating benefits they are not to take into "consideration any benefit which they may find has accrued subsequent to the extension of the street" (1); that "they are not bound to levy any assessment whatever * * * except for such benefits as accrued immediately from the extension of the street in question" (2); and that "they are not at liberty to levy any assessment * * * and that they have no right to consider any enhancement or

increase in value that is the result of any special improvement made upon the street immediately after it was opened and established as previously stated."

In the instruction of the court to which exception was taken (R., p. 40) the word "extension" as used in all of these omitted instructions had been explained as meaning the "establishment, laying out, and completion for all the ordinary purposes of a public highway or thoroughfare."

Keeping this definition in mind, it will be seen that the jury were not restricted, in their estimate, from making assessments for such benefits as accrued from grading and paving the street, from improvements made by private owners, and from water mains, sewers, and sidewalks, for all of these things were done either before or contemporaneously with the "completion of the street for *all* the ordinary uses of a public thoroughfare or highway."

But assuming that the word "extension," as used in the act, was correctly defined by the trial justice as meaning "establishment, laying out, and completion for all the ordinary purposes of a thoroughfare or highway," and included grading and paving, the jury should still have been told that water mains, sewers, and sidewalks ought not to enter into their estimate as an element of benefit, inasmuch as a certain fixed part of the cost of such improvements is assessed against the abutting land under general taxing laws in force—water mains at $1.25 per front foot of the lots, sewers at $1 a running foot, and sidewalks according to the material used, in some cases one-half of the entire cost. It would accomplish double taxation to require landowners to pay for these as benefits resulting from the extension, and, in addition, the amounts assessed under taxing laws provided for the community at large.

In any event, therefore, it was error, serious error, to refuse the fourth prayer of the plaintiffs in error, which sought to remove from the consideration of the jury such benefits as might result from water mains, sewers, and side-

walks. From this, or some other element of supposed benefit, the plaintiffs in error suffered a grievous wrong, if any dependence can be placed on their exceptions to the verdict, which show that the assessments against their lots were "unjust, unreasonable, excessive, and tend to the confiscation of exceptants' property." (R., p. 23.) Whether this was so or not, the trial justice had no means of knowing, for the evidence was not taken before him. It is stated in the bill of exceptions in the record of the Columbia Heights Realty Company case (No. 157, p. 112) that the trial justice refused even to hear the "substance of the testimony taken before the said jury and abstracted by the appellant."

In other words, the trial justice held that the assessments were reasonable and fair, and overuled the exceptions of the land-owners, which complained that these assessments were grossly unfair and excessive, though he had not heard, and had refused to hear, the evidence upon which the verdict of the jury was predicated.

We, therefore, submit that the judgment of the court below should be reversed and the case remanded for rehearing in a tribunal where the justice presiding may hear the evidence before deciding that it justifies the verdict of the jury.

Respectfully submitted.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Plaintiffs in Error.

APPENDIX.

Sections 252-265, Chapter 11, of the Revised Statutes of the United States Relating to the District of Columbia.

"SEC. 252. Whenever application shall be made to the proper authorities, by residents of the District without the limits of Washington and Georgetown, to lay out a new or alter any existing road, and whenever such authorities shall deem it conducive to the public interests to open a new road, or widen or change the course of an old one, the route of such road shall be surveyed, and a plat or map of the same prepared.

"SEC. 253. The proper authorities shall cause notice to be given, by advertisement twice a week for three weeks, of the proposed opening of the new road, or of the alteration of an existing one, calling upon all persons who may have any objections thereto to present them to such authorities at their next regular meeting, when, if any objections are made, such objections shall be heard.

"SEC. 254. If the route only is objected to, and another suggested as more advantageous, such route may be adopted, or five discreet, disinterested men, of whom the surveyor shall be one, may be appointed to examine all the proposed routes and report such one as they shall deem most feasible and advantageous to the District, and such report shall be made to the authorities at their next meeting.

"SEC. 255. If no objection to opening or altering a road is made by the owners of the land through which it must pass, after such notice, it shall be taken for granted that no damages are or will be claimed, and the road may be recorded and opened, and shall then be a public road or highway.

"SEC. 256. The notice required to be given by section two hundred and fifty-three need not be given when all the parties interested are agreed, and all roads laid out under such agreement without notice being given are lawful highways.

"SEC. 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof.

"SEC. 258. It shall be the duty of the marshal, upon receiving the order mentioned in the preceding section, to give the owners not less than ten days' notice of the time and place of the meeting of the jury to assess their damages.

"SEC. 259. In cases where the notice cannot be served on the owner and in all cases where the land through which it is proposed to run a road shall belong to a minor or minors, it is presumed that objection is made, and damages shall be assessed accordingly.

"SEC. 260. The marshal shall summon the jury, and administer an oath or affirmation to them that they will, without favor or partiality to any one, to the best of their judgment, decide what damage, if any, each owner may sustain by reason of running the road through his premises.

"SEC. 261. In making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land, or otherwise, and shall give their verdict accordingly.

"SEC. 262. The jury, having been upon the premises and assessed the damages, shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which the marshal shall transmit to the proper authorities at their next meeting, and which shall be recorded.

"SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury.

"SEC. 264. The verdict of the second jury, signed by each of the jurors, or a majority of them, shall be returned to

the proper authorities at their next meeting and recorded as final and conclusive, and the road shall then be declared a public road, and opened as such.

"SEC. 265. In all cases where it becomes necessary to summon a second jury to assess damages, if the amount assessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict; but if greater, they shall be paid by the District. All expenses up to the second jury shall be paid by the District."

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 148.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, AND ROSE DOUGLAS MERRIAM, PLAINTIFFS IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND CHESTER HARDING (ACTING), COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

The point first to be determined in the decision of this case is the propriety of proceeding under the act of June 6, 1900, considered apart from the judgment of the Court of Appeals that further proceedings must be under the act of March 3, 1899.

By its terms the act of June 6, 1900 provided that its instrumentalities may be invoked to assess benefits resulting from the extension of Eleventh Street only "in the event

erty be set aside because made without warrant of law. But the Court of Appeals held that as he had not excepted to the verdict he could not avail himself of exceptions by others. Relief was denied. He was therefore required to relieve his property from the lien of the tax sale certificate at a cost of some $1,800.

The most curious result of the inconsistent and contradictory decisions of the Court of Appeals on the effect of such exceptions comes from the judgment of that court in the last case wherein the matter was considered—

Macfarland *vs.* Umhau, decided December 7, 1909.

(This case is not yet reported in the Appeal Cases, but is to be found in the 37th Washington Law Reporter, p. 818.)

This case arose under the act of March 3, 1899, for the extension of Sherman Avenue and involves the same proceedings that were considered in the case of Todd *vs.* Macfarland, *supra.* Todd's case, however, was a second appeal from an order confirming the verdict and was decided May 20, 1902.

Rosa Wallach, one of the plaintiffs in error, and her brother, the late Jesse Brown, inherited a considerable tract of land along the lines of Eleventh Street and Sherman Avenue in what is known on the city maps as "Todd and Brown's Subdivision." They were parties to the proceeding to extend Sherman Avenue, and when the verdict was returned May 9, 1900, they filed exceptions on the ground that the assessments were grossly excessive. Their exceptions were overruled, the verdict confirmed and an appeal noted. The case is reported as Brown *vs.* Macfarland, in 19 App. D. C., 525, and was decided April 1, 1902, about a month before the decision in Todd's case was promulgated.

On Brown's appeal, the order confirming the verdict of the jury was reversed and the cause remanded that "proceedings may be taken and the jury of twelve ordered, as directed by the statute."

Umhau, and many other owners of property on Sherman Avenue, had not excepted to the verdict but supposed that all property owners would be treated alike when the jury of twelve was impaneled. This was but natural, for the law required that at least one-half the amount awarded as damages should be assessed against lands within specified areas, and to set aside the assessments as to some property owners and not as to all would destroy the equation which Congress had enacted should be an indispensable prerequisite of the proposed extension.

Four years passed during which time nothing further was done. But on the 29th of June, 1906, Congress passed an act, presumably at the instance of the District Commissioners, providing for a reassessment on Sherman Avenue, again under the act of June 6, 1900. Three weeks prior to the passage of the act of June 29, 1906, and on June 6, 1906, a jury proceeding under the act of June 6, 1900, in this case, had made a reassessment on Eleventh Street of all property benefited or supposed to be, by the extension of that street. It was reasonable to suppose that similar proceedings would be instituted for reassessment along the line of Sherman Avenue, and Umhau and other non-exceptants rested in daily anticipation that this would be done.

But they were never summoned to appear before a second jury of reassessment. A supplemental petition was filed in the original cause on the 7th day of January, 1907, of which non-exceptants had no notice, warning some of those who had appeared before the first jury to be and appear before a second jury summoned as required by the act of June 6, 1900. None of the non-exceptants had notice of this supplemental petition. Instead, their property was advertised for sale in March, 1908, as for failure to pay the assessment levied by the first jury on May, 1900, nearly eight years before, which had been entered as a tax against their property on the books of the District Assessor. Eight or ten of these non-exceptants filed bills in the Supreme Court of the

District seeking to enjoin the threatened sale of their property and contending that they were entitled to the benefit of the law of June 29, 1906, which provided that assessments should be levied only to the extent of benefits actually conferred.

Restraining orders were issued as prayed but the Commissioners prayed a special appeal which was allowed, and Umhau's cause was selected as a test case. The order granting the temporary restraining order was reversed by the Court of Appeals, and the District authorities left at liberty to sell the property of all non-exceptants at any annual tax sale.

Briscoe *vs.* Macfarland, 32 App. D. C., 167:

This appeal also arose in the proceeding to extend Rhode Island Avenue under the act of February 10, 1899. On the incoming of the verdict, Briscoe filed exceptions on the ground that the assessment greatly exceeded the benefits and that the law in its operation was unconstitutional on the authority of Norwood against Baker, but the court overruled the exceptions and confirmed the verdict.

Some years later the Commissioners advertised his property for sale, for failure to pay the assessment. Briscoe thereupon brought his bill in the Supreme Court of the District setting out that he had filed exceptions to the verdict and claiming that the exceptions vacated the verdict as to him and entitled him under the law to a jury of twelve. The bill prayed that the sale might be enjoined and the assessments declared illegal and void. This was denied by the Court of Appeals on Briscoe's appeal from an order of the Supreme Court of the District dismissing his bill. In its opinion the court says (p. 175):

> "While it (the court below) acted contrary to law in not ordering the reassessment by a new jury, its order of confirmation is not void but erroneous and voidable merely."

This can only mean that the mere filing of exceptions has not the slightest effect on the verdict, for it does not prevent the court from confirming the verdict over the exceptions.

How then can the corporation counsel contend in this case (and the contention is made only in this case and now for the first time), that expressions of dissatisfaction by the property owners "nullified the original assessments." Not only do they not have that effect but they present not the slightest obstacle to the forays of the taxgatherer proceeding stealthily under the guise of conferring benefits.

From these citations it appears that the decisions of the Court on Appeals on this much-litigated question are utterly inconsistent. For Eleventh Street, as now contended by the Corporation Counsel, the rule is that exceptions nullify the verdict. This rule, however, does not extend in full vigor as far as Sherman Avenue, three hundred feet away, for, as decided in the Umhau case, exceptions on that street affect only the property of exceptants. Before we reach Rhode Island Avenue, not more than a mile away, the rule is entirely lost, and exceptions to the verdict of the jury of seven on that avenue as Briscoe has learned, have no effect whatever. And this in the very teeth of section 263, Chapter 11, R. S. D. C., that when property owners express dissatisfaction the Marshal *"shall be ordered to summon a jury of twelve"* and the previous ruling of the Court of Appeals in Brown's case that the summoning of such a jury is an *"express mandate of the statute."*

This is a condition that should not continue. It is simply intolerable, especially on Sherman Avenue where one lot owner is taxed only to the extent of benefits conferred, while the owner of the adjoining lot is taxed on an entirely different basis and without any regard whatever to benefits actually received. How these methods work out may be ascertained by a comparison of the two verdicts returned in this case. According to the first verdict, passed on the arbitrary apportionment theory, the aggregate of assessments

was $134,560 (No. 157 R., p. 4); under the second verdict, predicated of the benefit assessment theory, the aggregate was but $96,682. It is to be assumed that all of these property owners are law-abiding citizens and should be treated alike in all matters of taxation.

As was said by the late Justice Field in the case of

Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 549, 599.

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax."

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Plaintiffs in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 148.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, AND ROSE DOUGLAS MERRIAM, PLAINTIFFS IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND CHESTER HARDING (ACTING), COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

BRIEF OF THE PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

The several assessments against parcels of land which the plaintiffs in error must pay or procure to be paid are set out in the record at pages 19-23. They aggregate $7,700. In addition an assessment of $800, charged against lot 8, in block 13, which belonged to plaintiffs in error when the proceedings were instituted, was paid under protest, but with the understanding between Mr. Dulany and one of the Commissioners of the District that the amount would be returned in the event that the plaintiffs in error finally prevailed in their contention that the assessments were all invalid.

Proceedings in this case had been pending nearly seven years before the verdict of the second jury was returned. The continued delays on the part of the District authorities to complete the proceedings instituted by them was a great hardship on property owners affected thereby. Some lots belonging to the plaintiffs in error were sold at less than prevailing market rates subject to the assessments; others could not be sold except with guaranties that the lien of the assessments would be removed without cost to the purchasers.

The details of these sales and guaranties are shown in the affidavit of Henry Rozier Dulany, who has had exclusive charge of this matter for the plaintiffs in error since the inception of these proceedings, printed as an appendix to this brief.

This affidavit is submitted, in accordance with the long-established practice of this court, to show that the amount in controversy exceeds the jurisdictional amount when that fact does not affirmatively appear on the record.

Course *vs.* Stead, 4 Dall., 22.
Micas *vs.* Williams, 104 U. S., 556.
Whiteside *vs.* Haselton, 110 U. S., 296.

It is perhaps not out of place to call attention to the provision of section 4 of rule 6 of this court, which requires that notice of motions to dismiss writs of error and appeals must be served "on the counsel for plaintiff in error or appellant of record in this court at least three weeks before the time fixed for submitting the motion." This rule was not observed by counsel for defendants in error, who gave no notice or intimation of their intention to make the motions until the afternoon of Saturday, April 9, 1910, some days after the cause was on the daily call for hearing in this court.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Plaintiffs in Error.

APPENDIX.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 148.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, and ROSE DOUGLAS MERRIAM, *Plaintiffs in Error,*

vs.

HENRY B. F. MACFARLAND AND OTHERS, *Commissioners of the District of Columbia.*

DISTRICT OF COLUMBIA, *sct:*

Before me, the undersigned, a notary public in and for the District of Columbia, personally appeared in said District HENRY ROZIER DULANY, who, being first duly sworn, deposes and says:

I am a resident of the District of Columbia, and for twenty years last past have been engaged in business in Washington as a real estate, insurance, and loan agent.

As such agent I have had exclusive charge of land on both sides of the extension of Eleventh street N. W., in said city, belonging to the plaintiffs in error in the above-entitled cause.

When a petition was first filed in the Supreme Court of the District of Columbia by the Commissioners of said District, seeking to condemn the land necessary for the extension of said Eleventh street, under the act of Congress approved March 3, 1899, the said Rosa Wallach and her brother, the late Jesse Brown, owned the following-described

land, abutting on and within two hundred feet of the proposed new street, all in what is known as Todd and Brown's subdivision, against which assessments were levied by a jury of seven, as impaneled in said court in accordance with the prayer of said petition; block 16, lots 6, 12, and 13; block 17, part of lot 9; block 14, lot 4; block 18, lots 4 and 5, and lot 13, in block 8.

The assessments so returned against said lots belonging to the plaintiffs in error were vacated, and further steps of one sort and another were taken in the cause, but a second assessment by a jury was not made until June 6, 1906.

Meanwhile, and, to wit, on the 21st day of June, 1904, the said Jesse Brown died, and by his will devised his interest in said lots to the above-named Emily N. Wallach, Mary Alexander Mitchell, and Rose Douglas Merriam.

Since the verdict of the said first jury was set aside I succeeded in selling for the plaintiffs in error some of the lots so belonging to them, subject to the assessments, at prices much below what would have been asked for them but for the cloud of said assessments. Others of said lots were also sold by the plaintiffs in error, but only on condition that they would undertake and agree to guarantee against any assessments that had been or might be made against said lots because of the extension of said street—that is, if such assessments were finally upheld and declared valid liens upon said lots the plaintiffs in error would cause them to be paid and satisfied without cost to the purchasers or any of them. Some of the lots so sold were subdivided by the purchasers and do not appear in the verdict of the second jury, as they were assessed by the first jury or in the names of the said plaintiffs in error, but are assessed by new subdivision numbers on said maps and to different owners.

Under said guarantees the plaintiffs in error are liable to have the lien of the assessments, set forth and shown in the said verdict of the second jury, removed from the following-named lots, and the amounts set opposite each lot paid and settled, viz:

Block 16, lots 79 to 92, being subdivision lots of part of lot 6	$2,300
Block 14, part of lots 3 and 4, as described on page 20 of the record	1,500
Block 18, lots 55 and 63, being subdivision of lots 4 and 5	1,450
Total	$5,250

The assessment levied by said second jury against lot 8, in block 13, belonging to the plaintiffs in error, and amounting to $800, was paid by this affiant, under protest, with the assurance from Commissioner Henry L. West that it would not in any sense be regarded as a payment to vitiate pending proceedings; in other words, with a tacit understanding that if the said assessment was finally declared invalid the money would be returned to the plaintiffs in error.

In addition to the aforegoing, the assessments returned by said second jury against lots near to and abutting on said Eleventh street are still unpaid as follows:

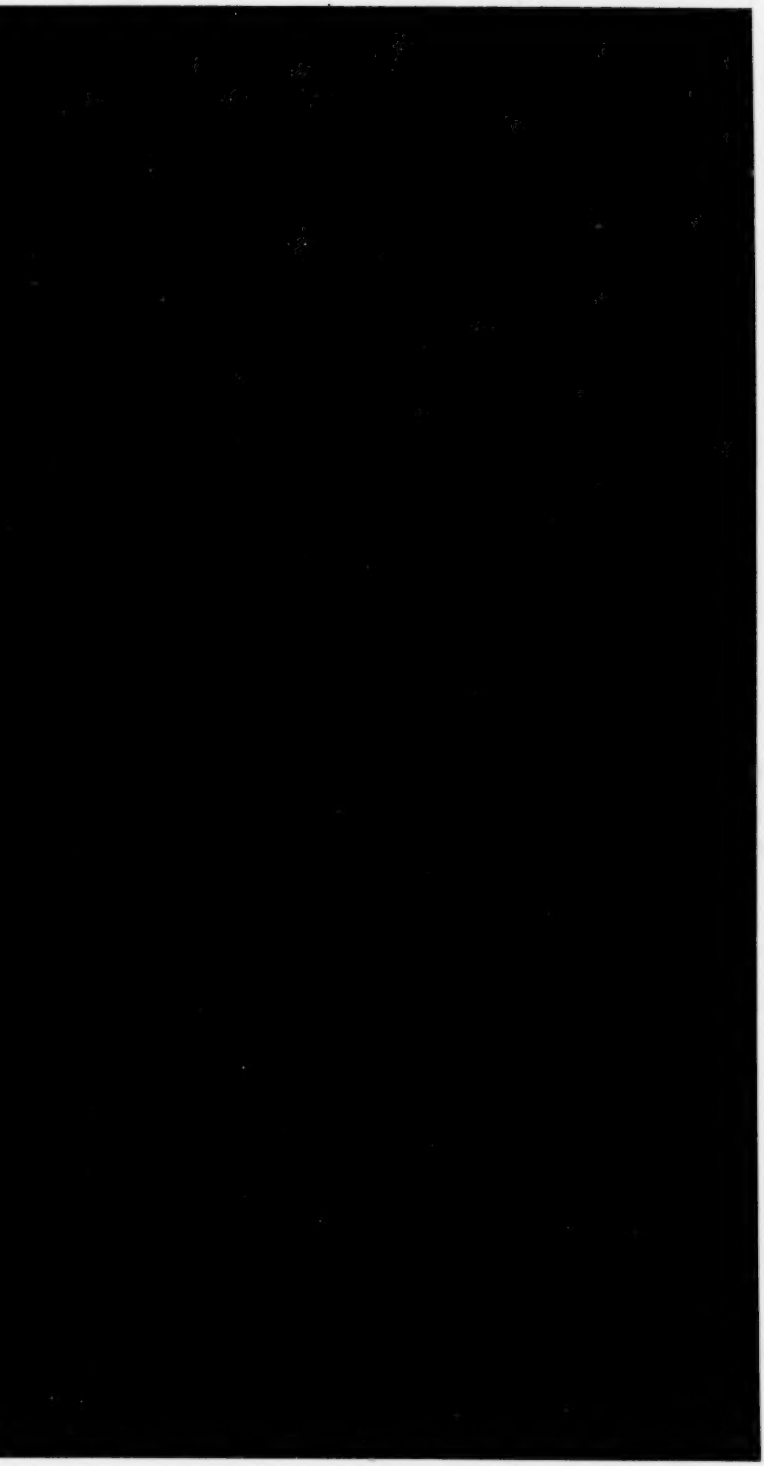
Block 16, lot 13	$400
Block 16, lot 12	50
Block 17, lot 9	2,000
Total	$2,450

To sum up, the plaintiffs in error are liable to pay or procure to be paid assessments returned by said second jury to the aggregate of $8,500.

HENRY ROZIER DULANY.

Subscribed and sworn to before me this 11th day of April, 1910.

ROBERT E. P. KREITER,
Notary Public, D. C.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 148.

ROSA WALLACH AND OTHERS, PLAINTIFFS IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST AND CHESTER HARDING (ACTING), COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

On March 3, 1899, Congress passed an act entitled "An act to extend S street in the District of Columbia, and for other purposes," which provided for a number of street extensions, as follows, in part: (For act complete see Appendix.)

> "SEC. 3. That within ninety days after the passage of this act the Commissioners of the District of Columbia are hereby authorized and directed to institute by a petition in the Supreme Court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension of Eleventh

street northwest on a straight extension of the lines thereof, as now established in the city of Washington, with a width of ninety feet, from Florida avenue to Harvard street, and thence with the same width and in a straight line to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue.

"That of the amount found due and awarded as damages for and in respect of the land condemned under this act for the extension of the said Eleventh street at least one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting that portion of the street to be opened, and extending to a depth of 200 feet from the building lines of said Eleventh street as extended."

* * * * * * *

"SEC. 5. That the proceedings for the condemnation of said lands as provided for in sections one, two, and three and four of this act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of lands in said District for public highways;"

* * * * * * *

"SEC. 7. That the sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground the jury shall take into consideration the situation of said lots, and the benefits that they may severally receive from the opening of said streets. When the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into considera-

tion any benefits that may accrue to the remainder thereof from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made on or against that part of such lot as is not taken, as is hereinbefore provided."

* * * * * * *

"SEC. 9. That payment of the awards made in respect of the property condemned shall not be made until the assessments herein provided for shall have been made against the aforesaid property and duly confirmed."

Chapter 11 of the Revised Statutes, referred to in section 5 of the above act, was a general law providing for the opening of highways in the District of Columbia, and its provisions, so far as they are material to this hearing, are as follows:

Sections 252 and 256 provide for the application to the proper authorities to open a new road; for notice to parties interested; for the appointment of a commission to lay out the road and report by them, and for the establishment of the road in case no objection is made. The act then proceeds: (Sections 252-267 complete in Appendix.)

"SECTION 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on the day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof."

Sections 258-262 prescribe the mode of procedure of the jury summoned by the marshal on the application of the proper authorities.

> "SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury."

Under the authority of these provisions the Commissioners of the District of Columbia instituted proceedings which were duly prosecuted to a verdict, returned by the jury on the 16th day of February, 1900, by which assessments aggregating $134,560 were found, of which $35,673 was against property of these appellants. On the 19th day of March, 1900, an order *nisi* was passed confirming the said verdict unless cause to the contrary should be shown on or before the 19th day of April, 1900, and thereafter a number of exceptions and objections to the verdict were filed by parties interested.

In the meantime the case of Davidson *vs.* Wight (16 App. D. C., 371), which involved the consideration of a provision of the same statute practically identical in terms with section 3 of the act quoted above, had been decided by the Court of Appeals of the District of Columbia, the court holding that the provision of the act which required the jury to assess one-half the amount of the awards upon the adjacent property was unconstitutional and void, and an appeal by the Commissioners of the District of Co-

lumbia from that decision to the Supreme Court of the United States was pending.

On June 6, 1900, while the exceptions and objections to the aforesaid verdict of the jury were pending, Congress passed an act entitled "An act for the extension of Columbia road, east of Thirteenth street, and for other purposes," which provided a different manner of procedure and a different theory of assessment from that provided in the act of March 3, 1899, the most important difference being that, instead of imposing upon the jury the duty of arbitrarily assessing a fixed proportion of the amount of the awards, the jury were directed to assess upon such property as they found would be benefited by the extension such a proportion of the awards for the land taken as they found said properties would be benefited by reason of the said extension; and provided further that, if the aggregate amount of the benefits assessed was less than one-half of the amount awarded for the land condemned, the Commissioners of the District of Columbia may, at their discretion, reject the award and assessment of the jury, and all proceedings thereunder should be null and void.

The concluding paragraph of section 12 of said act provides:

> "The Commissioners of the District of Columbia are hereby authorized and directed to make application to the Supreme Court of the District of Columbia holding a district court, for the final ratification and confirmation of the awards of the jury for and in respect to the land condemned for the extension of Eleventh street; and said awards, when so ratified, shall be paid as provided by said act of March third, eighteen hundred and ninety-nine, anything in said act to the contrary notwithstanding. And in the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall for any

reason be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for a reassessment of such benefits under and in accordance with the provisions of this act." (Act set out in full in the appendix.)

On the 3d day of July, 1900, the cause coming on, upon the motion of the Commissioners of the District of Columbia, to ratify and confirm the verdict of the jury filed in the case, the court passed an order finally ratifying and confirming the several awards of the jury for and in respect of the land condemned for the extension of Eleventh street, and directing the payment of the several sums awarded by the jury for the lands aforesaid under the authority of the act of June 6, 1900, and the court further declared the several assessments for benefits returned and levied by the said jury illegal, null, and void, and the said assessments were set aside and vacated (R., 9).

From this decree, in so far as it declared the assessments for benefits to be illegal, null, and void, the Commissioners of the District of Columbia appealed to the Court of Appeals, and the case was heard in that court on April 1, 1902. The decision in the White and Davidson case, having in the meantime been reversed by the Supreme Court of the United States (181 U. S., 371), the Court of Appeals was constrained to reverse the order of the lower court, setting aside and vacating the assessments, and the case was remanded with directions to vacate such part of the order appealed from as vacated the assessments and for such other proceedings in the cause, according to law, as may be right and just. The court in its opinion however stated that it would be unjust to the parties interested to deprive them of a second hearing on objections filed, to which they were entitled under the original act authorizing the proceeding, by reason of the fact that

they relied on the decision of the Court of Appeals in the Wight and Davidson case, which had afterwards been reversed, the court further stating that justice required that they would be allowed their election whether to accept the verdict of the first jury or express dissatisfaction thereto, which would entitle them to a second hearing. (19 D. C. App., 531.)

From this decision an appeal was taken by the Commissioners to this court, which appeal was dismissed on the ground that the decree of the Court of Appeals was not a final decree. The mandate was returned to the Supreme Court of the District of Columbia on the 22d day of July, 1903, and on March 4, 1904, that court passed the following order (R., 12):

> "Upon consideration of the mandate of the Court of Appeals filed in this case, it is this 4th day of March, 1904, ordered that the decree in this case, vacating said assessment and only so far as it vacates said assessment, be and the same is hereby set aside and vacated, in accordance with said mandate. And the case being further heard on motion of the petitioners for confirmation of the assessment for benefits according to the verdict of the jury of seven, and after argument by counsel for the parties and due consideration of the exceptions of the respondents, from which it appears to the court that they and each of them are dissatisfied with said verdict, it is therefore ordered that said motion to confirm be, and the same is hereby in all respects overruled; and it is further ordered, in case the petitioners desire to proceed further in the premises, that they shall within a reasonable time make application to the court for directing the United States marshal to summon a jury of twelve as provided by law. To which

order petitioners except and pray an appeal in open court.

"ASHLEY M. GOULD, *Justice.*"

The appeal noted was never prosecuted.

On June 17, 1904, and before any proceedings were had under the aforesaid order, a motion was filed by "Abner Greenleaf and other property-owners, representative of record by Leo Simmons and Samuel Maddox," to dismiss the suit as to any further proceedings, because the law under which such proceedings must be had had been repealed; and, second, for failure of the petitioners to proceed as required by the order of this court passed on the acts of March 4, 1904, which motion was signed "Leo Simmons and Sam'l Maddox, attorneys for said owners," and upon the same date, June 17, 1904, the following order was passed (R., 13.):

> "Upon consideration of the proceedings herein and the motion filed by Abner Greenleaf and others on June 17th, A. D. 1904, it is, by the court, this 17th day of June, A. D. 1904, ordered, That the petitioners in the above-entitled cause, within sixty days from the date hereof, proceed in the matter of the reassessment of benefits herein, in accordance with the terms and provisions of the act of Congress approved June 6, 1900, entitled 'An act for the extension of Columbia Road east of Thirteenth street, and for other purposes.'
>
> "By the court.
>
> "(Signed) ASHLEY M. GOULD, *Justice.*"

Pursuant to the last order, and by leave of court, the Commissioners of the District of Columbia, on August 9, 1904, filed an amended and supplemental petition in which they set forth the filing of the original petition on May 31, 1899, the proceedings pursuant thereof culminating in the

return of the verdict of a jury on February 16, 1900; the passage of the act of June 6, 1900; the order of July 3, 1900, confirming the verdict as to the awards and vacating the same as to the assessments; the appeal to the Court of Appeals and the order of reversal therein; the order of March 4, 1904, vacating the prior order, which set aside the assessments, following the mandate of the Court of Appeals, and further overruling the motion and confirming the verdict by reason of the expressions of dissatisfaction; and the order of June 17, 1904, directing them to proceed in accordance with the provisions of the act of June 6, 1900; and the bill prayed for the summoning of a jury by the marshal that the reassessment might be had under the provisions of the said act (R., 14).

Notice by publication according to the provisions of the act of June 6, 1900, was given of the filing of the supplemental petition, setting forth its purpose and warning all persons having any interest in the proceedings to appear in court on a day named in the notice and continue in attendance until the court should have made its final order ratifying and confirming the reassessments and benefits of the jury to be impaneled therein. Thereafter a jury to reassess benefits was duly summoned and duly accepted and sworn by the court on March 16, 1906 (R., 51).

On March 29, 1906, these appellants filed pleas to the supplemental petition to the effect that the reassessments of benefits, if any, to lots owned by the appellants could be had only under and in accordance with the act of Congress approved March 3, 1899, under which the proceedings in this cause were instituted; and these appellants further pleaded that the cause of action set up in said petition filed on the 9th day of August, 1904, did not accrue within three years next before the filing thereof. The jury of reassessment returned their verdict on June 6, 1906, in which assessments aggregating $2,450 were returned against property owned

by the plaintiffs in error (R., 19), to which verdict, on July 5, 1906, these appellants filed exceptions (R., 23) based, in substance, on the following grounds:

That the assessments against the lots owned by them were unreasonable, excessive and unjust;

That it would be inequitable after the great lapse of time to confirm said assessments;

That the cause had not been proceeded with in accordance with the direction of the Court of Appeals and could not properly have proceeded except as so directed and submitting the matters at issue to a jury of twelve;

The plea of the statute of limitations;

That the commission or jury was not chosen or summoned as required by law;

That the jury was not sworn as required by law;

That the verdict of the jury was predicated on errors on the part of the presiding justice in granting and refusing certain instructions, as to which exceptions were noted at the time;

That the verdict was in disregard of the evidence and that the jury declined to receive certain evidence offered by the appellants and was sustained therein by the justice presiding.

The exceptions were overruled and the verdict was confirmed on May 6, 1907, from which judgment these appellants appealed to the Court of Appeals, which court affirmed the judgment of the Supreme Court of the District of Columbia, from which latter decision this appeal has been taken.

ARGUMENT.

I.

The Reassessment Proceedings Were Properly Had under the Act of June 6, 1900.

The provision of the above-named act pertinent to this discussion is:

> "And in the event that the assessments for benefits levied by the jury in relation to said Eleventh street, shall for any reason be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for reassessment of such benefits under and in accordance with the provisions of this act."

The assessments referred to were first vacted by the order of July 6, 1900, which order was subsequently reversed by the Court of Appeals, that court, however, directing that parties interested should have the opportunity of expressing dissatisfaction and having the assessments vacated by that means if they so elected. Subsequent expressions of dissatisfaction by all of the property owners and the order of Justice Gould, March 4, 1904, predicated thereon, nullified the original assessments. And thereupon under the explicit and mandatory provisions of the act of June 6, 1900, it became the duty of the Commissioners of the District of Columbia to proceed for reassessment in the manner prescribed therein, no question being made as to its validity.

The Commissioners having been "directed" by the act of June 6, 1900, to make application for the final ratification and confirmation of the awards for land condemned for the extension of Eleventh street, filed February 26, 1900; and

the act having provided that "said awards, when so ratified, *shall be paid* as provided by the act of March third, eighteen hundred and ninety-nine, anything in said act to the contrary notwithstanding," no proceedings under the latter act could thereafter have been taken.

This is what the parties, represented now by the plaintiff in error, contended June 17, 1904, by their motion to dismiss the suit because the act of March 3, 1899, had been repealed by the act of June 6, 1900 (R., 13), and it is pertinent to observe that this motion was made for the purpose, apparently, of making it impossible for the Commissioners of the District of Columbia to proceed under the order of the court, passed May 4, 1904 (R., 13), which "further ordered, in case the petitioners desire to proceed further in the premises, that they shall, within a reasonable time, *make application* to this court for directing the United States marshal to summons a jury of twelve as provided by law" (act of March 3, 1899), and for the purpose of rendering that order abortive.

On this point we refer to the opinion of Associate Justice Barnard (R., 32, 33):

> "It is contended by counsel for the respondents that the Court of Appeals in the said case of Macfarland *vs.* Byrnes, decided that the respondents had a right to have a jury of twelve, and to proceed under the act of March 3, 1899, if they should so elect, and that the fact that the said act of March 3, 1899, had been held to be unconstitutional by the Court of Appeals would not be sufficient to set in motion the instrumentalities of the act of June 6, 1900, for reassessment. The last part of this contention is no doubt correct, but it does not follow, when the respondents decline to accept the verdict of the jury, under the act of March 3, 1899, that they can still claim a right, or that it is the only method left open by the

law for them to have a jury of twelve and proceed under that law.

"The act of June 6, 1900, authorizes and directs the Commissioners of the District of Columbia to apply to this court for the final ratification and confirmation of the award of the jury, in respect to the damages for the land condemned for the extension of Eleventh street; and when said award is ratified said act provides for the payment of the said damages in accordance with the said act of March 3, 1899, 'anything in said act to the contrary notwithstanding.' This portion of the act of June 6, 1900, certainly changes the former law, section 9 of which prevented payment for damages until assessment for benefits had been made and confirmed. It is possible for the award of damages to be confirmed and the damages paid, without respect to the confirmation of the verdict assessing the benefits, under the said act of June 6, 1900, and such separation did in fact take place.

The award for damages was confirmed and the money paid, while the verdict, in so far as it assessed benefits, was vacated. It turns out that the vacation of that portion of the verdict was erroneous, because it was based on the theory that the law, so far as such benefits were concerned, was unconstitutional; but when the constitutionality of the said act, in respect to said benefits, was determined by the courts, the said order vacating the said assessment was set aside, leaving the verdict to stand so far as that objection was concerned. Thereupon the said verdict assessing benefits came again before the court for final confirmation, when it was made to appear to the court that each of the respondents or acceptants was dissatisfied with said verdict, on its merits. Whereupon, instead of confirming the verdict, the court overruled

the motion to confirm; and it first undertook to hold that the Commissioners might proceed under the act of March 3, 1899, by having the marshal summon a jury of 12; but the Commissioners not taking any step to proceed under the said act, by virtue of said order, the court, a little over three months later, but during the January term, passed the order of June 17, 1904, ordering the Commissioners to proceed within sixty days in accordance with the act of June 6, 1900, thereby in effect setting aside or modifying its former order *pro tanto*.

"It seems to me that this was competent for the court to do, on the theory that the dissatisfaction with the former verdict having been expressed by the property owners affected thereby, and insisted upon hearing the motion to confirm the said verdict, the court had no alternative but to refuse to confirm the verdict; and such refusal to confirm, and overruling the motion to confirm, was in effect an adjudication by the court of the invalidity of the said verdict, because the order was accompanied with the permission to proceed again to obtain a new jury; and when the said order of June 17, 1904, was passed, it seems to me it was warranted by the provision of the act of June 6, 1900, which provided in the event that the assessment for benefits should for any reason be declared void, the Commissioners were authorized and directed to apply to the court for a reassessment of such benefits, in accordance with the provisions of the said act of June 6, 1900.

"I do not understand that the Court of Appeals intended by the language used in the said case of Macfarland *vs.* Byrnes to hold that such order and such proceeding would be improper. The Court of Appeals expressly refused to direct what the proceedings should be in this court, leaving the landowners the

privilege of accepting the said verdict for assessment of benefits if they so elected; and on the other hand, if they elected to contest the matter further they were to have the opportunity to do so according to law.

"If the act of March 3, 1899, had not been held to be constitutional, there could have been no proceeding for a reassessment of benefits under the law, or the act of June 6, 1900, either, for the foundation for the whole proceeding would have dropped out.

"But when the law of March 3, 1899, was held to be constitutional, and when the act of June 6, 1900, modified it by providing for the separation of damages and assessments in the manner indicated; and when the effect of the subsequent order of the court was to adjudicate that the verdict making the assessment of benefits was void, because objected to by the landowners, then there seems to be no further method left for a reassessment than to follow the provisions of the act of June 6, 1900, because so far as that act is inconsistent with the act of March 3, 1899, it must necessarily repeal the former act; and it is inconsistent in several particulars, notably that of requiring a jury of seven instead of twelve, and in the matter of the oath of jurors as to the assessment of benefits, and as to the land upon which said benefits could be assessed, and also as to the amount of such benefits."

We also refer to the opinion of the Court of Appeals (R., 46):

"The first error assigned relates to the action of the court in ordering the proceeding to be continued under the provision of the act of June 6, 1900, instead of under the act of March 3, 1899.

"The substantial difference between the two acts

is that the former would require the new assessment to be made by a jury of twelve, while the latter limits the number to seven. The second, responding to a suggestion made by the court in Todd *vs.* Macfarland (20 App. D. C., 176, 184), cures the defect in the former relating to the payment of the assessed benefits in certain installments. The latter contains no limit of the area of assessment while the former does.

"We regard it as unnecessary to consider whether the later act was intended to supersede the former entirely as regards the reassessment of benefits under the proceeding pending when the same was approved. The appellant and others interested were apparently of the opinion that it did so, as is shown by their motion of June 17, 1904. The opposing parties accepting that view as correct, the court made the order of that day, and the proceedings were continued in accordance therewith, resulting in the verdict returned June 6, 1906, the confirmation of which is the subject of the appeal. No objection was raised to the new order of procedure until a late hour in the proceedings. The objection appears for the first time in the affidavit of Leo Simmons, filed February 7, 1907, which is recited in the preliminary statement of the case. This affidavit, which does not appear to have been acted upon by the court, unless it may be embraced in the final act of confirmation, fails to shew that the order of procedure was not his own conception, or that the motion had not been in fact filed. But were it more definite in its statement, it cannot be received to contradict the record. Having suggested the procedure under the later act and carried on the litigation, without objection, in accordance therewith, the appellant is estopped to object to the verdict on the ground alleged. Having made his

election he is bound by it. Iron Gate Bank *vs.* Brady, 184 U. S., 665, 668; Davis *vs.* Wakele, 156 U. S., 680, 689; Robb *vs.* Vos., 155 U. S., 1, 43; Clark *vs.* Barber, 21 App. D. C., 274, 280."

The sole ground upon which the appellants herein base their contention that the reassessment proceedings should be had under the provisions of chapter 11 of the Revised Statutes of the District of Columbia consists of a dictum of Mr. Justice Morris in his opinion on the appeal rendered in this case (Byrnes *vs.* Macfarland, 19 D. C. App., 531), as follows:

"There is, however, a third consideration, which we cannot ignore in the disposition of this case. By the act of Congress of June 6, 1900, already mentioned, it was provided that, if for any reason the assessments for benefits should be declared void, the Commissioners should make application to the court for a reassessment. This evidently has no reference to the invalidity consequent upon the judicial decision of the unconstitutionality of the act of Congress of March 3, 1899, for there could then, of course, be no lawful reassessment, since the foundation for the whole proceeding would fail. The holding of this court that the act of March 3, 1899, was unconstitutional did not therefore avail to set in motion the instrumentalities of the act of June 3, 1900, for reassessment. And when the Supreme Court of the United States held the act of 1899 to be a constitutional and valid exercise of legislative authority, all reason for reassessment under the act of 1900 vanished. Nevertheless, by the discordant tenor of judicial decision the appellees were induced to forego a right which should now be restored to them, that of summoning a second jury of assessment under

> chapter 11 of the Revised Statutes of the United States for the District of Columbia, under which these proceedings were instituted and have been prosecuted, if they now desire to avail themselves of that right. They may prefer to forego that right, and they may prefer no longer to contest the propriety and justice of the assessment. If they so elect, the court will of course enter the proper order or decree in the cause. If, on the other hand, they elect further to contest the matter, according to law, they should have the opportunity to do so. This court, therefore, should not now direct any final order or decree to be entered by the court below in the premises."

The court intended that the order vacating the assessments to be passed in the lower court pursuant to their mandate should not be conclusive, and that the owners of property assessed might, notwithstanding that reversal, at their option have a second jury summoned, but the above expression, in so far as it relates to the functions of the act of June 6, 1900, is, it is submitted, a purely gratuitous dictum. The provisions of the act of June 6, 1900, which are adverted to by the court were in no way whatever involved in that appeal, and it is difficult to understand why the court should go outside of the case then in hand to discuss that statute.

Furthermore, the observations of the court are clearly founded upon a misapprehension of the scope and purpose of that law. After stating that the provisions of the law for reassessment upon the original assessments becoming void could have no reference to invalidity consequent upon the judicial decision of the unconstitutionality of the act of March 3, 1899, because there could then be no lawful reassessments, since the foundation for the whole proceeding would fail, the court proceeds further to say that, the constitutionality of the act of March 3, 1899, having in the meantime

been affirmed, all reasons for reassessment under the act of 1900 vanished.

The effect of this reasoning is that the statute never could have had any valid purpose. Its purpose could not have been, the court says, to meet the question of the unconstitutionality of the original law, and it could have no purpose, he further says, if the original law was constitutional. This, it is submitted, in effect, attributes to Congress the doing of a vain thing.

We submit that a clear and valid purpose is discernible in the act of June 6, 1900.

In the first place, it contemplated a reassessment under the more liberal provisions prescribed therein in case the original assessments were set aside by reason of the arbitrary requirement of the assessment of one-half in the original act.

In the second place, not all of the parties assessed in the first verdict had taken exceptions, and such parties would be in the position to oppose a rehearing as to their properties. Therefore a difficulty would be encountered in the matter of a second jury for assessments only, as distinguished from awards, under the original act, which would arise out of the provision requiring an assessment of a fixed proportion of the award. If a second hearing was a partial one only it would be impossible to maintain the relative proportion between the assessments and the awards which the provisions of the act require.

Again, the act of March 3, 1889, prohibited the payment of the awards until the assessments were confirmed. The act of June 6, 1900, contemplating the possibility that the assessments might fail of confirmation, authorized the payment of the awards without regard to whether or not the assessments might be confirmed.

This latter provision destroyed the integrity of the verdict and rendered further proceedings under the original law at least of doubtful feasibility.

Chapter 11 of the Revised Statutes of the District of Columbia, under which the proceedings were directed to be had, contained no provision for levying assessments, and hence, no provision for a second jury for re-levying assessments in case the original assessments became vacated independently of the awards. Judge Alvey, in the case of Todd against Macfarland (20 D. C. App., 176), in considering the act which provided for the extension of Sherman avenue under precisely similar provisions, regarded the verdict contemplated by Chapter 11 of the Revised Statutes and the act of Congress of March 3, 1899 as indivisable. Speaking to an argument that the provision of Chapter 11 of the Revised Statutes providing for a second jury related to awards only, and could not relate to assessments as distinct from the awards, the court said:

> "The argument appears to be that the owner of the land is not entitled to have the verdict set aside simply because he may be dissatisfied therewith by reason of the assessment made upon his land, though he would be entitled to have it set aside and the case referred to a jury of twelve merely by signifying his dissatisfaction with the award of damages—it being supposed that section 263 of chapter 11, Revised Statutes, only applies to proceedings of condemnation and award of damages, and not to the incident thereto of assessments for benefits. In other words, that the verdict of the jury, in respect to the same land, could be divided, and held good and effective as to the damages awarded, but, as might be determined, held bad and without effect as to the benefits assessed. This contention, if it were supported, might leave the District government in rather an awkward predicament. But there is in reality no foundation for any such contention. Both award of damages and assessments for benefits are authorized and required to be made by

section 5 of the act of Congress of March 3, 1899, and not by section 263 of chapter 11 of the Revised Statutes. Both award of damages and assessments are required to be made by the same jury and returned as an *entire verdict,* and which verdict is required to be ratified or set aside as found by the jury, as the same may apply to or affect any parcel of land. The section 263 of the Revised Statutes has reference only to the mode of procedure. If the verdict of the jury were to be ratified as to the damages awarded, but set aside as to the assessment for benefits, either by the court below or this court on appeal, the consequence would be that the land-owner would be exonerated altogether from all payment of assessments *as there is no provision in the law that would authorize subsequent separate assessments in such case.* That would contravene the plain intent and purpose of the statute."

While the opinion in which the language quoted occurs was rendered subsequent to the passage of the act of June 6, 1900, it illustrates the necessity for the passage of the act. The act authorized the separation of the awards from the assessments in the verdict, and hence, there being no adequate provision of law for reassessment, the act provided one.

We submit that it was the duty of the court to construe the act in respect of its evident purpose and intent rather than give it a construction, as the learned judge seems to have done, by which no valid purpose could have been imputed to it. This dictum, purely obiter, of Judge Morris, cannot, it is submitted, operate as a repeal of the provisions of the act of Congress of June 6, 1900, under consideration here, or expunge it from the statute books. It has *not* been repealed nor invalidated, and imposed a duty on the Commis-

sioners which they have undertaken to perform in this proceeding.

The power of Congress to enact such legislation cannot now be questioned:

> "Owing to the former tendency of the courts to construe all tax proceedings in favor of the taxpayer, many cases occurred where the mere non-observance of a very technical matter permitted the taxpayer to profit by the neglect, and obtain the benefit of the improvement, while contributing nothing to its payment, to the great detriment both of the contractors and the municipalities. To remedy these evils, corative or reassessment statutes have been passed by several legislatures, and their validity generally admitted. These statutes are commonly in furtherance of justice, and it may be accepted as a general statement that in all except certain jurisdictional matters, if the defect that makes the assessment void is an irregularity or error that the legislature might originally have authorized, or an omission to do that which it was competent for the legislature to dispense with by statute, it is within the legislative prerogative to authorize by subsequent act the correction of such error or omission, and allow the local authorities to make a new assessment in place of the one void for irregularity or error, and which will be no violation of the Constitution of the United States" (Hamilton, Law of Special Assessments, §823 and cases).
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> Spencer *vs.* Merchant, 125 U. S., 345.
>
> Farrell *vs.* West Chicago Park Comm'rs, 181 U. S., 404.
>
> *In re* Commissioners of Elizabeth, 49 N. J. L., 563.

Another circumstance enlightens this question. The cases of Todd against Macfarland, *supra*, and Brown against Macfarland (19 D. C. App., 525), involving the construction of precisely similar provisions in the act providing for the extension of Sherman avenue, were remanded to the Supreme Court of the District of Columbia by the Court of Appeals, under somewhat similar circumstances to the case at bar. The language of the mandate in these cases is: That the "order appealed from must be reversed, and the case remanded, that proceedings may be taken, and a *jury of twelve* ordered, as directed by the statute."

It is significant that the language of the order remanding the Byrnes case is:

> "The cause will be remanded to the Supreme Court of the District of Columbia, with directions to vacate such part of said order, and for such further proceedings in the cause, according to law, as may be just and right."

At that time there was no curative act affecting the Sherman Avenue case, but legislation similar to that under consideration here was afterwards enacted, under which reassessment proceedings were taken in that case.

Counsel for the plaintiffs in error in their brief, pages 11 and 12, say:

> "That on the part of the appellees in the former appeal (Macfarland *vs.* Byrnes, 19 App. D. C., 531) (not, however, the present plaintiffs in error) it was contended that the order of Mr. Chief Justice Bingham in declaring the assessments for benefits to be illegal and void set in motion the instrumentalities of the act of June 6, 1900, and that no further proceedings could be had in the cause under the act of March 3, 1899, not even by way of appeal from the

> order itself. This contention was strenuously opposed by the corporation counsel in an elaborate brief."

And again, on page 19, counsel state:

> "The main question before the Court of Appeals in Macfarland *vs.* Byrnes was whether the further proceedings should be under the act of March 3, 1899, or the act of June 6, 1900."

There is absolutely no warrant to be found in the record in that case for the assertions above quoted as far as they relate to the contention of the District of Columbia. The Macfarland *vs.* Byrnes case was an appeal by the Commissioners of the District of Columbia from the order of Justice Bingham vacating the assessments. The purpose of the appeal was to have that order reversed and the assessments confirmed; and, further, that those assessments should be adjudged as final and conclusive. The court, however, while reversing the order of the lower court which vacated the assessments, allowed the property owners their option as to the acceptance or the rejection of the assessments, which would involve further proceedings in case of property owners objecting. It was from this phase of the decision which the Commissioners of the District of Columbia appealed to the Supreme Court of the United States, as will be shown by the records and briefs in the cases of Macfarland *vs.* Byrne (187 U. S., 246) and Macfarland *vs.* Brown (187 U. S., 239).

II.

These Appellants Were Not Entitled to a Hearing by a Jury of Twelve on the Matter of Assessments.

It will be observed that section 5 of the act of March 3, 1899, provides, that the proceedings for the "*condemnation of said lands,*" not the proceedings for the assessments, shall be according to section 11, of the Revised Statutes of the District of Columbia, which provided only for a proceeding before a jury summoned by the marshal upon the application of the proper authorities, and did not provide for any proceeding whatever in court. The act of March 3, 1899, required the institution of these proceedings, to be by petition filed in court. There was no provision in chapter 11 for assessments of benefits by the jury, but that is provided by section 5 of the act of March 3, 1899. The verdict of the jury of award under the provisions of chapter 11, did not require confirmation by the court, to become effective, nor is there anything in the act of March 3, 1899, which requires the awards to be confirmed by the court, the sole provision in that regard being that payments of the awards were prohibited until the assessments were confirmed. On the other hand the assessments are required to be confirmed by the court before becoming effective. Reading both acts together it requires a strained construction to make the provisions of chapter 11 with respect to a second jury applicable to assessments found under the provisions of section 5 of the act of March 3, 1899.

Moreover that act arbitrarily requires the assessment of one-half the award, thus making the function of the jury with respect to assessments, essentially different from their duties with respect to the awards, as to which their discretion was unrestricted.

III.

These Appellants Are Estopped from Disputing the Proceedings under the Act of June 6, 1900.

It appears from the record (R., 13) that the order directing that the proceedings be had under the provisions of the act of June 6, 1900, was predicated upon and brought about by a motion filed by these appellants June 17, 1904, as follows:

> "Now come Abner Greenleaf and other property owners representative of record by Leo Simmons and Samuel Maddox and move the court to dismiss this suit, as to any further proceedings in this cause, because the law under which such proceeding must be had has been repealed. Second, for failure of the petitioners to proceed as required by the order of this court, passed in the cause on March 4, 1904."

And on the same date, June 17, 1904, the court passed an order directing proceedings to be had in accordance with the act of June 6, 1900, which order is prefaced by the words, "Upon consideration of the proceedings herein and the motion filed by Abner Greenleaf and others on June 17th, A. D. 1904."

No protest or objection of any kind was made to this order by any of the parties for a period of nearly two years after it was rendered, a supplemental petition and other proceedings having in the meantime been filed pursuant thereto.

Thus it appears that it was upon the motion of these appellants that the order under which the subsequent proceedings were had was predicated. It is respectfully suggested that they are estopped from asserting that the present proceedings are without authority of law, and, in any event,

that this apparent attempt to play fast and loose with the court should not be countenanced. If the motion of Abner Greenleaf and others had been expressly overruled by the court and proceedings directed for reassessment under the act of March 3, 1899, the jury would have been obliged to have returned a verdict assessing in the aggregate $134,000 rather than assessments aggregating $96,000 returned in the second verdict, based upon the unhampered discretion of the jury.

Parties cannot assume two inconsistent positions in the same controversy.

> "It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Davis *vs.* Wakelee, 160 U. S., 680; also Iron Gate Bank *vs.* Brady, 184 U. S., 665, 668; Robb *vs.* Vos, 155 U. S., 1, 43; Clark *vs.* Barber, 21 App. D. C., 274, 280.

IV.

There was no Error in the Instruction of the Trial Judge Defining the words "Extension of the Street."

The fourth assignment of error relates to the concluding sentence of the first instruction given by the court to the jury, as follows:

> "By extension of the street the jury are to understand its establishment, laying out and completion

for all the ordinary uses of a public thoroughfare or highway."

The statute requires the jury to assess such benefits as they find against those pieces or parcels of land which they find will be benefited by the extension of the street. The argument that the word "extension" merely means the acquisition of the land necessary for the purpose of the extension and that the jury are limited to that consideration, would render the provisions with reference to assessments entirely vain. No possible benefit could result to any property by reason of the acquisition of this land unless the import of such acquisition was that it would be followed by the physical extension of the street. Moreover, the property-owners procured from the court an instruction under which they were awarded damages, predicated upon the physical extension of the street, and not merely the acquisition of the land and the demarkation of the street line (addition to Record). Their claim that they should be awarded damages for an actual street and assessed benefits for a paper street, involves a patent inconsistency. The definition of the word extension given the court, as modified by the other instructions given in the case, is, it is submitted equitable.

Sugar Refining Company *vs.* Mayor, etc., of Jersey City, 26 N. J. Equity, 254.

In this connection the attention of the court is called to the following language of section 2 of the act of June 6, 1900, respecting the assessment of benefits, "and in determining the amounts to be assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Columbia Road as aforesaid." This language is meaningless if the contention of the plaintiffs in error is correct, that the benefits to be

assessed should relate simply to the condemnation of the land necessary for the street extension and not to the physical extension.

In the case of Bauman *vs.* Ross, 167 U. S., 585, the court discussed the meaning of the word "opening" in certain sections of the act of 1893, commonly known as the "Highway Extension Act," and held that that statute authorized merely the proceedings necessary to acquire the land necessary for streets and highways covered by the highway extension plan and not their physical opening, and in that respect the statute is similar to the statute under consideration here. In that statute it was provided that the jury in awarding damages for any piece or parcel of land taken for the extension of the street should take into consideration benefits accruing to the remainder of such piece or parcel of land by reason of the "condemnation" of the land necessary therefor, and certain other sections of the statute provided for the assessment of benefits generally resulting from the "establishment" of the street or highway. The court says (p. 594):

> "The reasonable construction is that the benefits to be taken into consideration and deducted in estimating the compensation or damages under sections 10, 11, and 13, are the special and direct benefits which the *appropriation* of part of a tract of land for a highway may cause to the remainder of the tract; and that the benefits for which an assessment is to be made under section 15 upon such remainders and upon all other lands benefited, are the general benefits accruing to all lands in the neighborhood from the establishment of the highway."

The same distinction can be observed between the provisions of Chapter XII, R. S. D. C., with respect to benefits to the remainder of a tract part of which was taken and the provisions of the special statute under consideration here. Under the

old law the jury in awarding damages were directed to take into consideration any benefits which they might find would result to the remainder of any tract by reason of the "condemnation" of part thereof for a street. The language of the act under consideration is that the jury shall assess benefits which they find will result from the *extension* of the street.

V.

The Other Instructions Granted and Refused by the Court.

A number of requests for instructions were submitted to the court on behalf of parties interested and of the petitioners, and were considered by the court. Some of them were refused, and others, after some modifications by the court at its own instance, were granted. The instructions given were as follows (R., 40, and stipulation):

> "It is the duty of the jury to consider and assess the benefits which have resulted to the pieces or parcels of land on each side of Eleventh street, northwest, extended, from Florida avenue to Lydecker avenue and the benefits which have resulted to any and all other pieces or parcels of land from the extension; and in determining the amounts to be so assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of the said pieces or parcels of land and the benefits that they have severally received from the said extension of the said Eleventh street. By extension of the street the jury will understand its establishment, laying out and completion of all ordinary uses of a public thoroughfare or highway.
>
> "The jury are instructed that in ascertaining whether any benefit has accrued to any piece or par-

cel of land abutting upon or within the vicinity of Eleventh street, extended, they shall not take into consideration any benefit that they find which has accrued to the land in question subsequent to the extension of the street. Therefore, in order to levy an assessment for benefits against any piece or parcel of land abutting upon said street or adjacent thereto the jury must find that the benefit upon which such assessment is based was brought about by the extension of said street, and not by any improvement made since it was extended, or by the extension of the car line in said street.

"The jury is further instructed that they are not bound to levy any assessment whatever for benefits in this case unless they find the property so assessed actually benefited by enhancement in value and that such benefit accrued immediately from the extension of the street in question.

"And in establishing such benefits, in case they shall find any, they shall take into consideration the damage done to any piece or parcel of land abutting said street or adjacent thereto by reason of leaving the same above the established grade thereof; that is to say, if they should find any piece or parcel of land benefited by the laying out and the opening of said street, and shall also find that by reason of the grade of said street being fixed at a point much below the level of such ground, and that such ground by reason thereof is left far above the said street grade so as to cause damage on account of grading the same, they shall take such grading into consideration, and if they find that the damage so sustained exceeds the benefits accruing, as formerly instructed, they shall not assess such piece or parcel of land at all; and in considering the benefits and the

damages caused by change of grade in extension of said street the jury should take into consideration the amount allowed, if any, for damages by reason of such change of grade by the former jury which assessed damages.

"The jury are instructed that they are not at liberty to levy any assessment against any piece or parcel of land abutting upon or adjacent to said Eleventh street unless they find such piece or parcel of land benefited by actual enhancement in value immediately upon the opening and extension of said street; and in considering whether or not any piece or parcel of land has enhanced in value they have no right to consider any enhancement or increase in value that is the result of any special improvement made upon the street after it was opened and established, as previously stated; neither have they the right to take into consideration any special improvement made upon any street crossing said Eleventh street."

These instructions, it is submitted, cover the law applicable to the case. An examination of the instructions which were refused by the court below will show either that they contained error or that the subject-matter of the instructions were substantially covered by those granted by the court.

So many instructions were requested by the various parties that the court properly epitomized the law applicable to the case in one set of instructions, which will be found to cover all of the essential features of the instructions refused which were sound in law.

The first instruction refused is practically identical with the second instruction granted by the court. The second and third instructions refused related to the refusal to admit the original verdict in evidence which is discussed elsewhere.

The fourth instruction refused clearly should not have been granted in the form requested, and is also covered by the second instruction which was granted. The fifth instruction refused involves the proposition which is discussed elsewhere in the brief as to the significance to be attached to the word "extension," and was properly refused.

VI.

The Court properly sustained the Chairman of the jury in refusing to receive in evidence the awards returned by the first jury for the land taken.

Counsel for the plaintiffs in error offered to introduce in evidence before the jury that portion of the original verdict containing the awards returned by the first jury for the land taken, but counsel for the District of Columbia objected to the introduction of any portion of the former verdict unless the entire verdict was introduced. Counsel for several of the other property-owners objected to the introduction of any part of the original verdict. The chairman of the jury refused to admit the verdict or any part of it in evidence, which action was certified to the court and the court sustained the chairman (R., 41). In this ruling of the court there was no error.

It is settled doctrine that the findings of a former jury are not competent testimony at a hearing *de novo* before another tribunal. It was contended in this case that the awards made by the first jury, having been ratified and accepted by the parties, were equivalent to a sale of the property, and should have gone to the jury on the question of the value of the property before the extension of the street, and would have aided the jury in determining the matter of benefits. This proposition is unsound and is not supported by the authorities.

Lewis on Eminent Domain, section 447, says:

> "What the party condemning has paid for other property is incompetent. Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are effected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such a price as may be fixed by the tribunal appointed by law. In most cases the same party must have the particular property even if it costs more than its true value. The fear of one party or the other to take the risk of legal proceedings ordinarily results in the one party paying more, or the other taking less, than is considered to be the fair market value of the property. For these reasons such sales would not seem to be competent evidence of value in any case, whether in a proceeding by the same condemning party or otherwise." Citing numerous authorities.

This reasoning applies to the question at issue here. The District accepted the verdict of the first jury as to the awards because, as pointed out in the brief of No. 157, the Commissioners had no option in the premises. Under the act of June 6, 1900, they were required to apply to the court for ratification of the awards and directed to pay the same, and, therefore, the argument that the payment of the awards by the Commissioners placed the transaction in the same category as an ordinary sale is without foundation.

Again, it may be that the provision of the law under which the first jury acted, requiring the assessment of one-half of the amount upon the adjacent land, may have affected the awards made by the jury in respect of the portions of the same land which were taken for the extension of the street. Where the awards and assessments

are correlated, as they were in the first hearing, the awards of the jury, as evidence on the question of values, is open to the objections suggested by the foregoing paragraph from Lewis.

It is submitted, further, that it is not necessary for the court to instruct commissioners or jurors in advance in cases of this kind unless the statute expressly provides for it.

Baltimore *vs.* Hennessy, 21 D. C., 489.
Flint *vs.* Detroit, 64 Mich., 350.
People *vs.* Eldridge, 6 Thomp. and C., 20.

In the case in 21 D. C., 489, the court said:

> "Ordinarily this court, sitting in general term, does not undertake to give instructions in such cases as this. There are general principles which are well established to govern the proceedings; if there should be any departure from them the party who was injured can apply to the court to obtain redress.
>
> "In certain cases of great importance, particularly under statutes which seem to require such interposition, we have departed from this practice and in advance have given instructions. Such was the case in the condemnation proceedings with reference to the site of the Post-Office, of the Congressional Library, and the Rock Creek Park.
>
> "We do not think any necessity is shown why we should give special instruction in advance in this instance, nor do we see that any harm will result to the parties from our declining to enter on their examination at this time.
>
> "One or more of them embody principles so well established that an assent to them in advance would scarcely have more force than their assertion before the jury by counsel on one side and the necessary

admission of their correctness by counsel on the other side.

"In declining now to give any instructions we are not to be understood as giving any intimation as to their correctness or incorrectness as they are now presented for our consideration."

The Statute of Limitations.

It is contended by the appellants that the right to proceed under the act of June 6, 1900, was barred by the statute of limitations prior to the filing of the amended and supplemental petition in August, 1904, more than three years having elapsed since the order of Judge Bingham, of July 3, 1900, setting aside the assessments. While it is not denied that the statute of limitations runs against a municipal corporation with respect to any private right of action of the corporation, based on contract or tort, the rule is quite different with respect to the public rights and duties of municipal corporations.

Dillon lays down the rule on that question as follows:

> "Municipal corporations, as we have seen, have in some respects a double character, one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporation should not fall within limit statutes and be affected by them. For example, in an action on contract, or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or that of its officers can defeat the right of the public thereto. Yet there may grow up in conse-

quence private rights of more persuasive force in a particular case than those of the public. It will, perhaps, be found that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of the limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel *in pais* as applicable to exceptional cases, since this leaves the courts to discharge the question, not by the mere lapse of time, but upon all the circumstances of the case, to hold the public estoppel or not as right and justice may require" (Dillon on Municipal Corporations, 695).

In Dixon *vs.* Railroad (1 Mackey, 83), where the plea of the statute of limitations was interposed, Mr. Justice Hagner said:

> "The right to recover damages for the depreciation of plaintiff's property by the inquisition, arises solely under the statute of 1872, and it is well settled that where the liability of a defendant is created, not merely by the act of the parties, but by the positive provisions of a statute, the plaintiff's remedy is not barred by the statute of limitations" (citing Angell on Limitations, section 8, p. 80).

The case of B. & O. R. Co. *vs.* District of Columbia (3 McArthur, 122) was a suit by the District of Columbia for unpaid tax, to which the plea of the limitation was interposed.

The court said, in regard to the length of time for which the company should be held liable:

> "We are of opinion that such liability reaches back for a period of twenty years from the institution of the present suit. It is a liability created by statute, and nothing short of a lapse of time sufficient to raise the presumption of payment will exonerate the property from its liability, and that period is twenty years."

In the case of McCartney *vs.* The People (202 Ill., 51), which was a suit on the part of the city to enforce the payment of a special assessment to which the statute of limitations was pleaded, the court said:

> "It is also contended that the city is barred from any further attempt to collect this assessment by the statute as to possession and payment of taxes for seven successive years, under claim and color of title paid in good faith, and by the laches of the county collector in failing to proceed to collect the same. It is a sufficient answer to both these positions to say that the statute of limitations does not run against a municipality acting in the discharge of a public duty. For like reasons the municipality cannot be prejudiced by the laches or omissions of duty by a public officer."

In the case of Greenwood *vs.* La Salle (137 Ill., 225), which was an action to recover a tax due on forfeited land, said the court:

> "It is first contended by counsel for defendant, that the court below erred in holding the plea of the statute of limitations bad. The attempt is made by opposing counsel to sustain that ruling, on the

ground that this is an action on a judgment, and, therefore, if the statute could be pleaded at all, the limitation would be twenty years instead of five. * * * The suit is for taxes due on forfeited property. Plaintiff below was only required to show a forfeiture in fact of delinquent land, at a regular tax sale for taxes legally due.

"The substantial, and, we think, valid objection to the plea is, that in this section no statute of limitations could run against the appellee, it being a quasi-municipal corporation. While the rule in this State is that the statute may be interposed to all actions by such corporations to enforce mere private rights, it is equally well settled that it is no defense to those involving public rights" (citing numerous cases).

But conceding, for the sake of argument, that the statute of limitations might be a proper defense in this case, there is, it is submitted, no merit in the contention that the right to proceed under the act of June 6, 1900, accrued on the third day of July, 1900, when the order of Judge Bingham vacating the assessments was passed. From that order the Commissioners noted an appeal. Its force and effect was suspended. When the appeal was heard the order was in fact reversed, and when the case came back on the mandate it was vacated. The right to proceed under the act of June 6, 1900, accrued, then, when the objections of the appellant were filed to the confirmation of the assessments upon the return of the mandate and upon the order of the court overruling the motion to confirm, which was passed on March 4, 1904.

Moreover, the proceeding was a continuous one; the amended and supplemental petition was no departure from the case originally begun. It was filed as a continuation of

the same proceeding under a later statute in obedience to the order of the court founded on appellant's motion, embodying the view that further proceedings could be had only under the later act.

The decision of the Court of Appeals should, it is respectfully submitted, be affirmed.

EDWARD H. THOMAS,
JAMES FRANCIS SMITH,
Attorneys for Defendants in Error.

APPENDIX.

The act of Congress approved June 6, 1900, entitled "An Act for the extension of Columbia Road east of Thirteenth street, and for other purposes," reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That within twenty days after the passage of this Act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute in the Supreme Court of the District of Columbia, sitting as a district court, by petition, particularly describing the lands to be taken, a proceeding *in rem* to condemn the land that may be necessary for the extension of Columbia Road east of Thirteenth street, through block twenty-three of Columbia Heights, with a width of sixty feet, so that the western terminus of Steuben street will be connected in a direct manner with the eastern terminus of Columbia Road as now located west of Thirteenth street.

SEC. 2. That of the amount found to be due and awarded as damages for and in respect of the land condemned for the extension of Columbia Road as herein provided, such amount thereof shall be assessed by the jury hereinafter provided as benefits, and to the extent of such benefits, against those pieces or parcels of land on each side of said Columbia Road as extended through block twenty-three of Columbia Heights, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia Road as said jury may find said pieces or parcels of land will be benefited; and in determining the amounts to be assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Columbia Road as aforesaid: *Provided,* That if the aggregate amount of the benefits to be assessed, as determined by said jury pursuant to the provisions hereof, is less than one-half of the amount of the

damages awarded for and in respect of the land condemned, the Commissioners of the District of Columbia may, in their discretion, reject the award and assessment of said jury, and all proceedings hereunder shall be null and void.

SEC. 3. That the said court shall cause public notice of not less than ten days to be given of the filing of said proceedings, by advertisement in such manner as the court shall prescribe, which notice shall warn all persons having any interest in the proceedings to attend court at a day to be named in said notice and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and assessment of benefits of the jury; and in addition to such public notice said court, whenever in its judgment it is practicable to do so, may cause a copy of said notice to be served by the marshal of the District of Columbia, or his deputies, upon such owners of the land to be condemned as may be found by said marshal, or his deputies, within the District of Columbia.

SEC. 4. That after the return of the marshal and the filing of proof of publication of the notice provided for in the preceding section, said court shall cause a jury of seven judicious, disinterested men, not related to any person interested in the proceedings, and not in the service or employment of the District of Columbia or of the United States, to be summoned by the marshal of the District of Columbia, to which jurors said court shall administer an oath or affirmation that they are not interested in any manner in the land to be condemned nor are in any way related to the parties interested therein, and that they will, without favor or partiality, to the best of their judgment, assess the damages each owner of land taken may sustain by reason of the extension of said street and the condemnation of lands for the purposes of such extension, and assess the benefits resulting therefrom as hereinbefore provided. The court, before accepting the jury, shall hear any objections that may be made to any member thereof, and shall have full power to decide upon all such objections, and to excuse any juror or cause any vacancy in the jury, when impaneled, to be filled; and after said jury shall have been organized and shall have viewed the premises, said jury shall proceed, in the presence of the court, if the court shall so direct, or otherwise as the court may direct, to hear and

receive such evidence as may be offered or submitted on behalf of the District of Columbia and by any person or persons having any interest in the proceedings for the extension of said street. When the hearing is concluded the jury, or a majority of them, shall return to said court, in writing, its verdict of the amount to be found due and payable as damages sustained by reason of the extension of said street under the provisions thereof, and of the pieces or parcels of land benefited by such extension and the amount of the assessment for such benefits against the same.

SEC. 5. That if the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from the extension of said street or highway, but such benefits shall be considered in determining what assessment shall be made on or against such part of such piece or parcel of land as may not be taken as hereinbefore provided.

SEC. 6. That the court shall have power to hear and determine any objections which may be filed to said verdict or award, and to set aside and vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable, and in such event a new jury shall be summoned, who shall proceed to assess the damages or benefits, as the case may be, in respect of the land as to which the verdict may be vacated, as in the case of the first jury: *Provided*, That if vacated in part, the residue of the verdict and award as to the land condemned or assessed shall not be affected thereby: *And provided further*, That the exceptions or objections to the verdict and award shall be filed within thirty days after the return of such verdict and award.

SEC. 7. That when the verdict of said jury shall have been finally ratified and confirmed by the court, as herein provided, the amounts of money awarded and adjudged to be payable for lands taken under the provisions hereof shall be paid to the owners of said land by the Treasurer of the United States *ex officio* commissioner of the sinking fund of the District of Columbia, upon the warrant of the Commissioners of said District, out of the revenues of the District of Columbia; and a sufficient sum to pay the amounts of said judgments and awards is hereby ap-

propriated out of the revenues of the District of Columbia.

SEC. 8. That when confirmed by the court the several assessments herein provided to be made shall severally be a lien upon the land assessed, and, shall be collected as special improvement taxes in the District of Columbia, and shall be payable in four equal annual installments, with interest at the rate of four per centum per annum from the date of confirmation until paid. That said court may allow amendments in form or substance in any petition, process, record, or proceeding, or in the description of property proposed to be taken, or of property assessed for benefits whenever such amendments will not interfere with the substantial rights of the parties interested, and any such amendment may be made after as well as before the order or judgment confirming the verdict or award aforesaid.

SEC. 9. That each juror shall receive as compensation the sum of five dollars per day for his services during the time he shall be actually engaged in such services under the provisions hereof.

SEC. 10. That the sum of three hundred dollars is hereby appropriated, out of the revenues of the District of Columbia, to provide the necessary funds for the costs and expenses of the condemnation proceedings taken pursuant hereto.

SEC. 11. That no appeal by any interested party from the decision of the Supreme Court of the District of Columbia confirming the assessment or assessments of benefits or damages herein provided for, nor any other proceeding at law or in equity by such party against the confirmation of such assessment or assessments, shall delay or prevent the payment of award to others in respect to the property condemned, nor delay or prevent the taking of any of said property sought to be condemned, nor the opening of such street: *Provided, however*, That upon the final determination of said appeal or other proceeding at law or in equity, the amount found to be due and payable as damages sustained by reason of the extension of said street under the provisions hereof shall be paid as hereinbefore provided.

SEC. 12. That the provisions of sections three, four, five, six, seven, eight, and eleven hereof, and the provisions of

section two hereof as to the assessment of benefits and as to the right of the Commissioners of the District of Columbia to reject the award of the jury, be, and the same are hereby made applicable to the several Acts of Congress approved March third, eighteen hundred and ninety-nine, entitled "An Act to extend S street in the District of Columbia, and for other purposes," and "An Act for the extension of Pennsylvania Avenue, southeast, and for other purposes," in so far as the same relate to the extension of Sixteenth Street northwest, as amended by joint resolution approved the thirtieth day of January, nineteen hundred, to the extension of Pennsylvania Avenue southeast, the extension of Staughton street, the extension of Eckington Place, the extension of Fifth street, and the extension of Howard avenue, except, nevertheless, that the assessment areas fixed by said several Acts in reference to said several streets shall be and remain as in and by said Acts of Congress provided.

The Commissioners of the District of Columbia are hereby authorized and directed to make application to the Supreme Court of the District of Columbia holding a district court, for the final ratification and confirmation of the awards of the jury for and in respect to the land condemned for the extension of Eleventh street; and said awards, when so ratified, shall be paid as provided by said Act of March third, eighteen hundred and ninety-nine, anything in said Act to the contrary notwithstanding. And in the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall for any reason be declared void, the said Commissioners of the District of Columbia are authorized and directed to make application to said court for a reassessment of such benefits under and in accordance with the provisions of this Act.

SEC. 13. That the name of Four-and-a-half Street northwest is changed to Fourth Street northwest.

Approved, June 6, 1900.

The act of Congress approved March 3, 1899, entitled "An Act to extend S street in the District of Columbia, and for other purposes," reads as follows:

[Public—No. 195.]

AN ACT to extend S street, in the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within thirty days from the passage of this Act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a District court, a proceeding to condemn the land necessary to open and extend S, Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite: *Provided,* That the owners of the "Kall" tract dedicate the land in said tract contained within the lines of said streets: *And provided further,* That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided.

SEC. 2. That within thirty days after the dedication to the District of Columbia of the lands lying within the lines of Sixteenth street northwest as extended (according to the highway plans), between the Piney Branch and the Blagden Mill road, and also between the Military road and the District of Columbia boundary line, the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a District court, a proceeding to condemn the land necessary for the extension of Sixteenth street northwest from Morris street to the District of Columbia boundary line with the uniform width of one hundred and sixty feet. That of the amount found due and awarded as damages for and in respect of the land condemned for the extension of Sixteenth street as in this section provided, not less than one-half thereof shall be as-

sessed by said jury in said proceedings against those pieces and parcels of ground situated and lying on each side of said Sixteenth street northwest between Morris street and the Piney Branch, and between the Blagden Mill road and the Military road, to a depth of two hundred and fifty feet, measured on each side from the building lines of the said Sixteenth street as extended.

SEC. 3. That within ninety days after the passage of this Act the Commissioners of the District of Columbia are hereby authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a District court, a proceeding to condemn the land necessary for the extension of Eleventh street northwest on a straight extension of the lines thereof, as now established in the city of Washington, with a width of ninety feet, from Florida avenue to Harvard street, and thence with the same width and in a straight line to Lydecker avenue, joining said avenue with its center line opposite the center line of Eslin avenue.

That of the amount found due and awarded as damages for and in respect of the land condemned under this Act for the extension of the said Eleventh street at least one-half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting that portion of the street to be opened, and extending to a depth of two hundred feet from the building lines of said Eleventh street as extended.

SEC. 4. That within ninety days after the passage of this Act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a District court, a proceeding to condemn the land necessary for the extension of New Hampshire avenue from the intersection of Whitney and Sherman avenues to the west line of Brightwood avenue at its intersection with the Rock Creek Church road, the same to be on a straight extension and of the same width of said avenue as now established in the subdivision of Petworth.

That of the amount found due and awarded as damages for and in respect of the land condemned under this Act for the extension of said New Hampshire avenue, at least one-half thereof shall be assessed by said jury in said pro-

ceedings against those pieces or parcels of ground abutting that portion of New Hampshire avenue to be opened, and extending to a depth of two hundred and fifty feet, measured on each side of the building lines of the said New Hampshire avenue as widened, and also on such other pieces or parcels of land as may, in the judgment of the said jury, be benefited by the extension and widening as herein proposed.

SEC. 5. That the proceedings for the condemnation of said lands as provided for in sections one, two, three, and four of this Act shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of lands in said District for public highways; and to provide the necessary funds for the cost of such condemnation proceedings, the sum of two thousand dollars is hereby appropriated, out of the funds of the District of Columbia.

SEC. 6. That payment of the sum or sums of money adjudged to be due and payable for lands taken under the provisions of this Act shall be made by the Treasurer of the United States, *ex officio* commissioner of the sinking fund of the District of Columbia, upon the warrant of the said Commissioners, out of the revenues of the District of Columbia; and a sufficient sum to pay such judgments and awards is hereby appropriated out of the revenues of the District.

SEC. 7. That the sums to be assessed against each lot and piece and parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of said lots, and the benefits that they may severally receive from the opening of said streets. When the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made on or against that part of such lot as is not taken, as is hereinbefore provided.

SEC. 8. That when confirmed by the said court, the as-

sessments shall severally be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia, and shall be payable in five equal installments, with interest at the rate of four per centum per annum until paid: *Provided*, That each juror shall receive a compensation of five dollars per day for his services during the time he shall be actually engaged in such services under the provisions of this Act: *And provided further*, That no appeal by any interested party from any decision of the supreme court of the District of Columbia confirming said assessment or assessments shall delay or prevent the payment of said awards in respect to the property condemned.

SEC. 9. That payment of the awards made in respect of the property condemned shall not be made until the assessments herein provided for shall have been made against the aforesaid property and duly confirmed.

Approved, March 3, 1899.

Sections 252 to 265, both inclusive, of the Revised Statutes of the United States relating to the District of Columbia, provide:

SEC. 252. Whenever application shall be made to the proper authorities, by residents of the District without the limits of Washington and Georgetown, to lay out a new or alter any existing road, and whenever such authorities shall deem it conducive to the public interests to open a new road, or widen or change the course of an old one, the route of such road shall be surveyed, and a plat or map of the same prepared.

SEC. 253. The proper authorities shall cause notice to be given, by advertisement twice a week for three weeks, of the proposed opening of the new road, or of the alteration of an existing one, calling upon all persons who may have any objections thereto to present them to such authorities at their next regular meeting, when, if any objections are made, such objections shall be heard.

SEC. 254. If the route only is objected to, and another suggested as more advantageous, such route may be adopted, or five discreet, disinterested men, of whom the surveyor shall be one, may be appointed to examine all the proposed routes and report such one as they shall deem most feasible

and advantageous to the District, and such report shall be made to the authorities at their next meeting.

SEC. 255. If no objection to opening or altering a road is made by the owners of the land through which it must pass, after such notice, it shall be taken for granted that no damages are or will be claimed, and the road may be recorded and opened, and shall then be a public road or highway.

SEC. 256. The notice required to be given by section two hundred and fifty-three need not be given when all the parties interested are agreed, and all roads laid out under such agreement without notice being given are lawful highways.

SEC. 257. If any owner of land shall object and claim damages, and the amount cannot be agreed upon, the proper authorities shall direct the marshal of the District to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof.

SEC. 258. It shall be the duty of the marshal, upon receiving the order mentioned in the preceding section, to give the owners not less than ten days' notice of the time and place of the meeting of the jury to assess their damages.

SEC. 259. In cases where notice cannot be served on the owner, and in all cases where the land through which it is proposed to run a road shall belong to a minor or minors, it is presumed that objection is made, and damages shall be assessed accordingly.

SEC. 260. The marshal shall summon the jury, and administer an oath or affirmation to them that they will, without favor or partiality to any one, to the best of their judgment, decide what damage, if any, each owner may sustain by reason of running the road through his premises.

SEC. 261. In making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land, or otherwise, and shall give their verdict accordingly.

SEC. 262. The jury, having been upon the premises and assessed the damages, shall make out a written verdict, to be signed by them, or a majority of them, and attested by the marshal, which the marshal shall transmit to the proper

authorities at their next meeting, and which shall be recorded.

SEC. 263. If the proper authorities or any owners of the land are dissatisfied with the verdict thus rendered, and no arrangement being made between them, the marshal shall be ordered to summon a second jury of twelve judicious, disinterested men, not related to any one interested, to meet and view the premises, giving the parties interested at least ten days' notice of the time and place of meeting. And the marshal and jury shall proceed as before directed in regard to the first jury.

SEC. 264. The verdict of the second jury, signed by each of the jurors, or a majority of them, shall be returned to the proper authorities at their next meeting and recorded as final and conclusive, and the road shall then be declared a public road, and opened as such.

SEC. 265. In all cases where it becomes necessary to summon a second jury to assess damages, if the amount assessed by the second jury shall not be greater than the amount assessed by the first, the costs of the second jury shall be paid by the parties objecting to the first verdict; but if greater, they shall be paid by the District. All expenses up to the second jury shall be paid by the District.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 148.

ROSA WALLACH, EMILY N. WALLACH, MARY ALEXANDER MITCHELL, AND ROSE DOUGLASS MERRIAM, PLAINTIFFS IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND CHESTER HARDING (ACTING), COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS THE APPEAL.

Now come the defendants in error and move the court to dismiss the appeal on the ground that the amount involved is less than $5,000, the sum necessary to give this court jurisdiction.

EDWARD H. THOMAS,
JAMES FRANCIS SMITH,
Attorneys for Defendants in Error.

From the record (pages 19-23) it appears that the only property subject to any of the assessments involved in this case, which is owned by the plaintiffs in error, consists of lot numbered 12, in block numbered 16, and part of lot numbered 9, in block numbered 17, the aggregate assessments against which amounts to $2,400. It is claimed by the plaintiff in error that pending this proceeding they sold certain other lots with a guaranty to indemnify the purchasers against prospective assessments arising from the extension of Eleventh street as to some of the properties so sold, which guarantee, it is claimed, imposed a contingent liability upon the plaintiffs in error which brings the amount involved above the jurisdictional amount.

This contention, it is submitted, is untenable. In the case of Hollander *vs.* Fecheimer, 162 U. S., 326, 328, this court said:

> "The whole basis of the decree, however, was the judgment for $1,000, which was the amount for which the general term directed a recovery. It is true that it also decreed the assignment to be void and remanded the case for further proceedings, that upon such further proceedings the court might direct an account to be taken and the property to be divided generally among the creditors, and that upon such accounting the plaintiffs might be admitted to prove the full amount of their claim. This amount, however, is not one directly involved in the decree, and the law is well settled that the jurisdiction is to be determined by the amount directly involved in the decree appealed from, and not by any contingent demand which may be recovered, or any contingent loss which may be sustained by either one of the parties through the probative effect of the decree, however direct its bearing upon such contingency. New England Mortgage Co. *v.* Gay, 145 U. S., 123. In that case, which was an action in assumpsit upon

promissory notes, there had been a finding by a jury that the transaction was usurious. The amount involved in the particular suit was less than $5,000, but the effect of the judgment under the laws of Georgia was to invalidate a mortgage given as security upon property worth over $20,000. It was held that, notwithstanding such indirect effect, this court had no jurisdiction, the amount directly in dispute being only the usurious sum. All the prior authorities upon the point are cited in this case."

WALLACH *v.* RUDOLPH ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA.[1]

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 148. Argued April 12, 13, 1910.—Decided May 16, 1910.

Jurisdiction to review, when dependent on amount, is determined by the amount directly and not contingently involved in the decree sought to be reviewed.

A writ of error will not lie to review a judgment of the Court of Appeals of the District of Columbia confirming assessments for less than $5,000, even though plaintiff in error may be contingently liable in case the judgment stands for other assessments exceeding $5,000, in the same proceeding on other lots disposed of pending the proceeding.

Writ of error to review 31 App. D. C. 130, dismissed.

THE facts, which involve the validity of certain assessments in the District of Columbia, and the jurisdiction of this court to review judgments of the Court of Appeals of the District of Columbia, are stated in the opinion.

Mr. Samuel Maddox, with whom *Mr. H. Prescott Gatley* was on the brief, for plaintiff in error.

Mr. James Francis Smith, with whom *Mr. Edward H. Thomas* was on the brief, for defendants in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This case was argued with the case of *Columbia Heights Realty Company* v. *The Commissioners of the District of Columbia*, and the questions presented are substantially the same. The plaintiffs in error were interested as owners of certain lots or parts of lots involved in the gen-

[1] Original Docket Title: Rosa Wallach *v.* Henry B. F. Macfarland and others, Commissioners of the District of Columbia.

eral proceeding for the condemnation of property for the extension of Eleventh street, and an assessment for benefits was confirmed as to the property owned by them. They were allowed to prosecute a separate writ of error to the Court of Appeals of the District of Columbia from so much of the award as affected them, where the judgment was affirmed, and from that affirmation this writ of error has been sued out. The aggregate of the amounts which affect these plaintiffs in error and in respect of which they have assigned error is only $2,450.

Jurisdictional limit upon writs of error and appeals to or from the Court of Appeals of the District of Columbia is $5,000, exclusive of interest and costs. See act of February 9, 1893, c. 74, 27 Stat. 434, 436.

To sustain the jurisdiction an affidavit has been filed to show that plaintiffs in error are contingently liable for an amount in excess of $5,000, if this judgment is sustained, by reason of like assessments in the same proceeding upon certain other lots or parts of lots, under other subdivision numbers and standing in the name of different owners, being lots disposed of pending the proceeding under an undertaking to remove the lien of any assessment for benefits which might be made herein. It does not follow as matter of law that such assessments against such other lots to other parties will be determined by this review. But, however this may be, "jurisdiction is to be determined by the amount directly involved in the decree appealed from, and not by any contingent demand which may be recovered, or any contingent loss which may be sustained by either one of the parties through the probative effect of the decree, however direct its bearing upon such contingency." *Hollander* v. *Fechheimer*, 162 U. S. 326, 328.

The motion to dismiss for want of jurisdiction must be granted, and the writ is accordingly

Dismissed.